ONTARIO
LABOUR RELATIONS BOARD
REPORTS

January/February 2013

Ontario

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REPORTS

A Bimonthly Series of Decisions from the
Ontario Labour Relations Board

Cited [2013] OLRB REP. JANUARY/FEBRUARY

EDITORS: VOY STELMASZYNSKI
LEONARD MARVY

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control over all aspects of the employment relationship, was the true employer – The Board went on to determine that excluding these temporary employees from the bargaining unit would not create serious labour relations problems for the employer, whereas including them in the unit would exacerbate the union's ability to represent these employees and weaken its negotiating position, particularly given the fragmentation in the workplace between the temporary and full-time employees – Certificate issued

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Certification – Construction Industry – Employer – When the general contractor on a worksite required employees to perform some deficiency work after the subcontract with a unionized employer had been completed, the unionized employer, who had no employees available to do the work, suggested to the general contractor that he call the hiring hall directly to secure workers – The union applied for certification for the workers employed doing the deficiency work – The Board held that the employer for purposes of the application for certification was the general contractor, notwithstanding that the payments and remittances for the workers were channelled through the subcontractor – Certificate issued

AQUICON CONSTRUCTION CO. LTD.; THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL UNION 1891.. 8

Certification – The IBEW sought to certify a bargaining unit of employees engaged in pruning trees and clearing vegetation that could interfere with hydro lines passing over various property within Hydro Ottawa's service area – Tamarack sought to rely on the 1971 Court of Appeal decision in Cedarvale Tree Services that workers employed in pruning trees and tree and stump removal were engaged in "horticulture" and thus excluded from the Act – The Board distinguished Cedarvale, finding the nature of the two companies' business was very different: Tamarack's work was 95% line clearing (versus Cedarvale's 30%) and involved no arboriculture or cultivation – Tamarack did not hold itself out as a company that performs horticultural work, rather its employees were described as "utility arborists" – Adopting a purposive approach, the Board chose to look at the employer's primary business: Tamarack's primary business was not horticulture, nor were any of its employees engaged in horticulture – Certificate issued

TAMARACK TREE CARE; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 636.. 170

Certification – Bargaining Unit – Construction Industry – Employee – Status – The Carpenters applied for certification for a bargaining unit of carpenters and carpenters' apprentices in the employ of Bermingham in the ICI and non-ICI sectors – The Board initially sought to determine whether three individuals, R, P and D, were employees in the bargaining unit on the application date, and therefore should remain on the employer's Schedule A – All three individuals were engaged in "pile driving," work that the parties agreed was in the ICI sector of the construction industry, and work that triggers the application of ministerial designations – Both the Labourers and the Operating Engineers have jurisdiction for pile driving, but it is also the work of a carpenter – Employee R performed the work pursuant to the IOUE Provincial Agreement – The Board held that it makes no labour relations sense to include on Schedule A individuals employed by an employer pursuant to a collective agreement with another trade union just because the work they were performing could also be performed by members of the applicant – R was removed from the Schedule – D was employed pursuant to a collective agreement between the HAND Association of Sewer, Watermain and Road Contractors and LIUNA; it was not an ICI agreement, so D remains on the employer's Schedule A – Finally, P was properly employed in the ICI sector pursuant to the HCAT Agreement with LIUNA, but he was not a member in good standing of the Labourers for part of the relevant time – Nonetheless, remittances were made to, and accepted by, LIUNA in accordance with the HCAT Agreement, therefore he was working in the bargaining unit on the application date – P was removed from the Schedule – Matter continues

BERMINGHAM CONSTRUCTION LIMITED; THE CARPENTERS' DISTRICT COUNCIL OF ONTARIO; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; UNIVERSAL WORKERS' UNION, LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183................................ 18

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SYSCO FINE MEATS OF TORONTO, A DIVISION OF SYSCO CANADA, INC., UFCW CANADA LOCAL 1000A.. 160

Change in Working Conditions – Employment Standards –Termination – The applicant sought termination and overtime pay from her former employer under section 116 of the Employment Standards Act ("Act") – The applicant, a graduate student employed in a laboratory for 30 hours per week, refused to extend her employment after being presented with an employment contract containing an intellectual property clause – Regarding termination pay, the Board considered whether the employee was constructively dismissed – Based on an objective analysis, the Board found the applicant had no reason not to believe that the contract represented new terms and conditions of her employment; the applicant was informed that she had to sign the contract in order to continue employment; and the inclusion of the clause was a change in fundamental term and condition of employment – Thus, the applicant was constructively dismissed – This conclusion was not affected by the fact that the clause was included in error – The applicant testified that she regularly worked beyond 30 hours per week in order to complete her work – The applicant's entitlement to overtime pay arose under the Act and not the university's policy because the applicant never sought authorization for the extra hours worked as required by the policy – In determining whether the employee received the employment standard or a greater contractual benefit in relation to hours worked in excess of 30 hours per week, but not in excess of 44 hours per week, the Board examined whether the applicant was a salaried employee or an hourly paid employee in form and substance – Salary is used to describe a fixed periodic payment for services rendered, but other characteristics, such as variation in compensation for hours worked, should be considered – The applicant was a salaried employee because her salary did not vary with the fluctuating hours she worked in each week – Nothing in the Act entitles a salaried employee to receive additional compensation for hours that exceed the normal hours, but are less than 44 hours per week, except where the employer does not pay the salaried employee at least the prescribed minimum wage under the Act – Although the applicant was entitled under the Act to overtime pay for hours worked in excess of 44 per week, the evidence was unclear whether the applicant worked more than 44 hours in any week – The applicant was entitled to termination pay and vacation pay, but not overtime pay – Application granted, in part

SAFAA SABBAH; RE UNIVERSITY OF OTTAWA; DIRECTOR OF EMPLOYMENT STANDARDS.. 141

Collective Agreement – Construction Industry Grievance – The union filed two grievances challenging Ontario Power Generation's imposition of a lifetime ban on the grievor that prevented him from working at any OPG facility either as an employee or as a contractor – The union also claimed damages on the basis that Aecon directed and encouraged the misconduct that gave rise to the ban – The grievor was a general foreman employed by Aecon, who was engaged as a subcontractor by OPG – The grievor falsified OPG training documents for two employees to indicate they were qualified to work as foremen responsible for crews of pipefitters – As a result, Aecon laid off the grievor and OPG subsequently banned him from working at any of its facilities – Regarding the first issue, the union argued that the provision of the collective agreement applicable to the grievance of OPG's decision required OPG to satisfy the "just cause" standard – The Board disagreed, as "just cause" does not apply to an entity that is not the employer of the grievor – The provision containing the language "unjustified" termination or disciplinary action only required OPG to justify or explain the reasons for its decision and that those reasons provide a rational foundation for the decision – The Board held that OPG established a rational basis for its decision because the decision was made after considering the relevant facts, the serious nature of the offence and the importance of accurate training documents – The union was unable to prove that the decision was arbitrary, capricious or made in bad faith; Aecon's disciplinary response was irrelevant to OPG's decision, there was no evidence of widespread fraudulent doctoring of training records or evidence that OPG was aware of, and even encouraged, this practice – OPG met its burden under the provision – On the second issue, the union argued that the grievor was pressured by Aecon management to falsify the records – The Board was not persuaded: it accepted that Aecon was pressuring the grievor to secure qualified employees, not directing him to falsify records – The Board rejected the argument that

Aecon improperly laid the grievor off, since a construction subcontractor can lay off an employee who has been prevented by the general contractor from working at a project – Grievances dismissed

ONTARIO POWER GENERATION INC.; RE: UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA; ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; AECON INDUSTRIAL DIVISION OF AECON GROUP INC.. 58

Collective Agreement – Practice and Procedure – Remedies – Standing – Strike – When the Elementary Teachers' Federation of Ontario ("ETFO") announced its intention to have a "day of protest," the Minister of Education filed an application pursuant to section 11 of the Putting Students First Act ("Bill 115"), alleging that ETFO and its President, Sam Hammond, contravened Bill 115, the Education Act and the Labour Relations Act, 1995 by engaging in unlawful activity, and that the application was in the public's interest – The union made several preliminary objections to the application on the basis of the jurisdiction of the Board and the lack of standing by the Minister – Concerning jurisdiction, the Board declined to defer the matter to the courts because Bill 115 envisioned the Board dealing with applications alleging violations of the statute, including unlawful strikes – The union raised arguments concerning the constitutionality of Bill 115, but the Board stated that it was only determining whether a political protest was an illegal strike – The Board held that the Minister had standing to bring the application because if the protest were deemed to be an illegal strike, it would be in contravention of Bill 115 – On the merits of the application, the Board followed well-established jurisprudence that a "political strike" during a collective agreement is still an unlawful strike – The Board was not persuaded that Charter-protected speech outweighed any disruption to the labour relations scheme that would be caused by the strike – Accordingly, the "day of protest" was an illegal strike – The Board made a number of declarations and orders, including a cease and desist order from authorizing, supporting, encouraging or threatening to call or authorize an unlawful strike

ELEMENTARY TEACHERS' FEDERATION OF ONTARIO AND SAM HAMMOND; MINISTER OF EDUCATION; ONTARIO PUBLIC SCHOOL BOARDS'ASSOCIATION;ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION.. 35

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MAYSTAR GENERAL CONTRACTORS INC.; UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183.. 51

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Board disagreed, as "just cause" does not apply to an entity that is not the employer of the grievor – The provision containing the language "unjustified" termination or disciplinary action only required OPG to justify or explain the reasons for its decision and that those reasons provide a rational foundation for the decision – The Board held that OPG established a rational basis for its decision because the decision was made after considering the relevant facts, the serious nature of the offence and the importance of accurate training documents – The union was unable to prove that the decision was arbitrary, capricious or made in bad faith; Aecon's disciplinary response was irrelevant to OPG's decision, there was no evidence of widespread fraudulent doctoring of training records or evidence that OPG was aware of, and even encouraged, this practice – OPG met its burden under the provision – On the second issue, the union argued that the grievor was pressured by Aecon management to falsify the records – The Board was not persuaded: it accepted that Aecon was pressuring the grievor to secure qualified employees, not directing him to falsify records – The Board rejected the argument that Aecon improperly laid the grievor off, since a construction subcontractor can lay off an employee who has been prevented by the general contractor from working at a project – Grievances dismissed

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Construction Industry Grievance – Judicial Review – The employer brought an application for judicial review challenging the Board's decision on the meaning of the term "manufacturer's rating" in the collective agreement – The Board interpreted the term within the context of the collective agreement to hold that the purpose of the provision was to focus on the maximum capacity, rather than the performance, of the crane – The Divisional Court affirmed that the standard of review is reasonableness as conducting a contextual interpretation of a term in a collective agreement is part of the expertise of a labour arbitrator – The Court found that the Board's decision was reasonable based on the conclusion and reasons for it – The Board was not required to interpret the term in the same way as similar terms in safety regulations – Application dismissed

C.W. SMITH CRANE SERVICES LTD.; RE: INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; ONTARIO LABOUR RELATIONS BOARD.. 212

Construction Industry Grievance – The union filed three grievances relating to the introduction of "telematics" (technology which provides information about a vehicle's use) in company vehicles, arguing that it was a unilateral change in working conditions and an unwarranted invasion of employees' privacy, with an impact on hours of work and remuneration; a fourth grievance was filed, relating to one employee's suspension for violating the "no personal use" of company vehicles policy – The grievances generally involved personal use of company vehicles, as well as compensation for time spent picking up and dropping off company vehicles by those employees who no longer wanted to take them home – The employer submitted it had a "no personal use" policy, but the union countered that "reasonable" personal use was tacitly accepted – The employer argued that the telematics device was introduced to monitor its assets not to track employees' whereabouts – The Board found that the collective agreement permitted the installation of telematic-like devices for reasons of efficiency and economy, and the employer was permitted to monitor vehicle use at all times – The Board also found that although there were inconsistencies in the application of the "no personal use" rule, with the introduction of telematics, the employer was able to enforce the rule strictly, and had given the union adequate notice of this new enforcement policy; the policy was a reasonable one – If employees choose to drop off/pick up their company vehicle at a location other than their home, the time spent travelling to and from the vehicle is not compensable – Since the communications around personal use were equivocal, the individual employee's two-day suspension was reduced to a written warning – Three grievances dismissed; fourth grievance allowed

OTIS CANADA INC.; INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS LOCAL 50 AND INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS LOCAL 96.. 81

Construction Industry – Judicial Review – Practice and Procedure – Stay – The applicant brought a motion for an interim order to stay the decision of the Board pending judicial review – The Court applied the following three-part conjunctive test: (1) a strong *prima facie* case for review on the merits of the application; (2) irreparable harm if the stay is not granted; and (3) the balance of convenience favouring granting the stay – The Court concluded that the applicant failed to establish a strong *prima facie* case for review on the basis of a lack of procedural fairness – The Court held that: (1) there was adequate notice of the hearing; (2) the Board allowed the applicant ample opportunity to explain why the hearing should not commence in Toronto; (3) the Board gave the applicant numerous opportunities to explain why certain documents should not be produced; (4) sections 1(5) and 69(13) dealt with an obligation to produce evidence, not reverse onus, and thus, were not unconstitutional – Regarding irreparable harm, the Court did not find there was sufficient evidence to make this conclusion – The Court did state, however, that the balance of convenience was in favour of granting the stay because there were other applications before the Board based on the decision at issue, which negatively affected the applicant and had no impact on the respondents – Nonetheless, the motion was dismissed

BUR-MET CONTRACTING LTD. ET AL; RE: CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1669; ONTARIO LABOUR RELATIONS BOARD, ATTORNEY GENERAL OF ONTARIO AND ATTORNEY GENERAL OF CANADA... 209

Delay – Judicial Review – The Faculty Association brought a motion for the court to dismiss four judicial reviews for delay as Mr. Khaiter, a member of the faculty of York University, had failed to set down any of the matters to be heard – These matters all relate to Mr. Khaiter's allegations that YUFA has failed to represent him fairly, which he brought to the OLRB and the HRTO – The Court noted that no date had yet been set to hear any matter and that the delays ran from two years and three months to over five years since the respective tribunal had issued its decision – The court found the delay occasioned by the failure to set any of the applications down for hearing made it clear that the delay was unacceptable – The issue then turned on whether this delay prejudiced YUFA – The court noted that the events giving rise to the original complaints go back years; "that the issues relate to employment" and that "to try and undertake these proceedings now would be disruptive and the validity of the results uncertain" – The court found the presence of prejudice obvious – The court noted however that it was uneasy dismissing the applications based on the evidence of delay, particularly because YUFA could have filed the Hearing Request Form and forced a hearing date – The court considered other factors – First it noted that Mr. Khaiter has been misusing the processes that the Board and the HRTO offer for a purpose not related to resolving the disputes at hand and that the delay in processing the four applications for judicial review is demonstrative of the same attitude and consistent with an effort to keep these disputes alive rather than bringing them to a conclusion – Second, he did not have a satisfactory explanation for the delay – The court concluded that by carrying these matters as he has, Mr. Khaiter delayed too long and lost or, by his actions, gave up the right to have the four applications for judicial review heard on the merits – Motion granted, applications dismissed

KHAITER; LABOUR RELATIONS BOARD (ONTARIO)... 214

Duty of Fair Representation – Ratification and Strike Vote – These applications alleged violations of the Act arising out of the round of teacher bargaining in Ontario, described in an earlier Board decision (R v. OSSTF 2012 CanLII 80016 ON LRB), resulting in the MOUs that were negotiated between the Government and OECTA – The applicants allege that OECTA has violated its constitutional provisions and by-laws by, among other matters, failing: to communicate with its members; to obtain proper authorization for bargaining; to abide by systemic bargaining objectives; to abide by the authorizing resolution of the Council of Presidents – OECTA brought a motion that there was no labour relations purpose to proceed given that the Putting Students First Act did not permit the relief sought and that all these matters were essentially internal union affairs where the appropriate recourse was political, not legal before the Board – The Board reiterated its longstanding jurisprudence which makes it clear that s. 74 explicitly deals with "representation of the employees in the unit" – The Board found that the upcoming elections in OECTA, where virtually all of the leadership responsible for the MOU will be challenged, was the appropriate place for the wisdom of these choices made by the OECTA leadership to be measured—not under the guise of an application of fair representation – The Board noted that the nature of political arrangements OECTA reaches with the Government of Ontario as a mature stakeholder in the education sector are not matters that this Board is either qualified to or should intervene in, question or regulate – The forum for addressing the extent to which OECTA's constitution or by-laws have been violated is the courts, not the Board, and finally an allegation under s. 44 requires ratification of a collective agreement and the MOU was not an agreement with one of the Catholic school boards, but rather an agreement with the government – Matters dismissed

RICHARD BROCK, PRESIDENT, ON BEHALF OF THE MEMBERS OF THE HALTON ELEMENTARY UNIT OF THE ONTARIO ENGLISH CATHOLIC TEACHERS ASSOCIATION (O.E.C.T.A), RE THE ONTARIO ENGLISH CATHOLIC TEACHERS ASSOCIATION (O.E.C.T.A.); HALTON CATHOLIC DISTRICT SCHOOL BOARD.. 109

Duty of Fair Representation – The applicant complained that OPSEU lost or abandoned a number of grievances she filed relating to the employer's failure to accommodate her or make efforts to relieve her of alleged harassment in the workplace – The evidence showed that three union representatives (two local presidents and a grievance officer) failed to process grievances and were grossly negligent in failing to return phone calls and email communication with the applicant – Since the employee had retired from the public service, remitting the matter to arbitration was not an option - Application allowed; declaration granted; remedy remitted to parties and Labour Relations Officer

TARA SATNARINE; ONTARIO PUBLIC SERVICE EMPLOYEES UNION; THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF ATTORNEY GENERAL... 190

Employee -- Bargaining Unit – Certification – Construction Industry – Status – The Carpenters applied for certification for a bargaining unit of carpenters and carpenters' apprentices in the employ of Bermingham in the ICI and non-ICI sectors – The Board initially sought to determine whether three individuals, R, P and D, were employees in the bargaining unit on the application date, and therefore should remain on the employer's Schedule A – All three individuals were engaged in "pile driving," work that the parties agreed was in the ICI sector of the construction industry, and work that triggers the application of ministerial designations – Both the Labourers and the Operating Engineers have jurisdiction for pile driving, but it is also the work of a carpenter – Employee R performed the work pursuant to the IOUE Provincial Agreement – The Board held that it makes no labour relations sense to include on Schedule A individuals employed by an employer pursuant to a collective agreement with another trade union just because the work they were performing could also be performed by members of the applicant – R was removed from the Schedule – D was employed pursuant to a collective agreement between the HAND Association of Sewer, Watermain and Road Contractors and LIUNA; it was not an ICI agreement, so D remains on the employer's Schedule A – Finally, P was properly employed in the ICI sector pursuant to the HCAT Agreement with LIUNA, but he was not a member in good standing of the Labourers for part of the relevant time – Nonetheless, remittances were made to, and accepted by, LIUNA in accordance with the HCAT Agreement, therefore he was working in the bargaining unit on the application date – P was removed from the Schedule – Matter continues

BERMINGHAM CONSTRUCTION LIMITED; THE CARPENTERS' DISTRICT COUNCIL OF ONTARIO; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; UNIVERSAL WORKERS' UNION, LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183................................. 18

Employee – Bargaining Unit – Certification - Construction Industry – Status – LIUNA applied to certify a bargaining unit of employees in all sectors except ICI – The status of three individuals was at stake: were they covered by a subsisting collective agreement? – Three employees were required short-term on a condominium project – One employee, G, had an on-going employment relationship with Maystar; he worked in ICI immediately prior to and after the week in question – Two other employees were engaged through the hiring hall for the non-ICI work – The latter two were easily and indisputably in the applicant's bargaining unit – As for employee G, the parties' agreement that he continue in his ICI employment for the non-ICI work could not withstand scrutiny – The Board held that practice as between parties to a collective agreement may give rise to contractual issues between them, but it cannot impact on the statutory rights of the applicant – All 3 employees were found to be in the bargaining unit for purposes of the application – Certificate issued

MAYSTAR GENERAL CONTRACTORS INC.; UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183.. 51

Employee – Employment Standards – Status – The applicant sought review of the Employment Standards Officer's refusal to issue an order for unpaid wages as a result of finding that the applicant was an independent contractor, and not an employee – The Board adopted the approach in Greco Health Shack and considered various factors rather than applying a universal test – The following factors indicated the applicant was an employee: (1) the applicant's hourly rate was set by the clinic; (2) the applicant was paid by the clinic after the clinic billed its clients or their insurance companies; (3) the applicant depended on the clinic for referrals as the clients belonged to the clinic; (4) the applicant had no share in the business; (5) the applicant was an integral part of the business as he was the sole provider of certain services; (6) the clinic had oversight of the applicant's appointments; (7) the clinic provided the applicant with equipment – The Board was not persuaded by the fact that the clinic did not withhold and remit income tax and other statutory employment deductions and that the applicant declared his income as self-employed because the Board found the substance of the relationship more important than the structure of compensation – Based on this analysis, the applicant was an employee – Application allowed

1139613 ONTARIO LIMITED O/A ACTIVE THERAPY & SPORTS CLINIC; JINSONG LI; DIRECTOR OF EMPLOYMENT STANDARDS.. 1

Employer – Certification – Construction Industry – When the general contractor on a worksite required employees to perform some deficiency work after the subcontract with a unionized employer had been completed, the unionized employer, who had no employees available to do the work, suggested to the general contractor that he call the hiring hall directly to secure workers – The union applied for certification for the workers employed doing the deficiency work – The Board held that the employer for purposes of the application for certification was the general contractor, notwithstanding that the payments and remittances for the workers were channelled through the subcontractor – Certificate issued

AQUICON CONSTRUCTION CO. LTD.; THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL UNION 1891... 8

Employer – Bargaining Unit – Certification – The Board first determined that Sysco was the employer of the employees supplied to it by an employment agency for the purposes of the Act – The Board found that Sysco possessed the effective and fundamental control over matters dealing with training, discipline, evaluation, day-to-day supervision, assignment of duties and amount of remuneration – Additionally there was a high level of integration of the workers into Sysco's workplace – Sysco, possessing the greatest control over all aspects of the employment relationship, was the true employer – The Board went on to determine that excluding these temporary employees from the bargaining unit would not create serious labour relations problems for the employer, whereas including them in the unit would exacerbate the union's ability to represent these employees and weaken its negotiating position, particularly given the fragmentation in the workplace between the temporary and full-time employees – Certificate issued

SYSCO FINE MEATS OF TORONTO, A DIVISION OF SYSCO CANADA, INC., UFCW CANADA LOCAL 1000A.. 160

Employment Standards – Change in Working Conditions – Termination – The applicant sought termination and overtime pay from her former employer under section 116 of the Employment Standards Act ("Act") – The applicant, a graduate student employed in a laboratory for 30 hours per week, refused to extend her employment after being presented with an employment contract containing an intellectual property clause – Regarding termination pay, the Board considered whether the employee was constructively dismissed – Based on an objective analysis, the Board found the applicant had no reason not to believe that the contract represented new terms and conditions of her employment; the applicant was informed that she had to sign the contract in order to continue employment; and the inclusion of the clause was a change in fundamental term and condition of employment – Thus, the applicant was constructively dismissed – This conclusion was not affected by the fact that the clause was included in error – The applicant testified that she regularly worked beyond 30 hours per week in order to complete her work – The applicant's entitlement to overtime pay arose under the Act and not the university's policy because the applicant never sought authorization for the extra hours worked as required by the policy – In determining whether the employee received the employment standard or a greater contractual benefit in relation to hours worked in excess of 30 hours per week, but not in excess of 44 hours per week, the Board examined whether the applicant was a salaried employee or an hourly paid employee in form and substance – Salary is used to describe a fixed periodic payment for services rendered, but other characteristics, such as variation in compensation for hours worked, should be considered – The applicant was a salaried employee because her salary did not vary with the fluctuating hours she worked in each week – Nothing in the Act entitles a salaried employee to receive additional compensation for hours that exceed the normal hours, but are less than 44 hours per week, except where the employer does not pay the salaried employee at least the prescribed minimum wage under the Act – Although the applicant was entitled under the Act to overtime pay for hours worked in excess of 44 per week, the evidence was unclear whether the applicant worked more than 44 hours in any week – The applicant was entitled to termination pay and vacation pay, but not overtime pay – Application granted, in part

SAFAA SABBAH; RE UNIVERSITY OF OTTAWA; DIRECTOR OF EMPLOYMENT STANDARDS.. 141

Employment Standards – Employee – Status – The applicant sought review of the Employment Standards Officer's refusal to issue an order for unpaid wages as a result of finding that the applicant was an independent contractor, and not an employee – The Board adopted the approach in Greco Health Shack and considered various factors rather than applying a universal test – The following factors indicated the applicant was an employee: (1) the applicant's hourly rate was set by the clinic; (2) the applicant was paid by the clinic after the clinic billed its clients or their insurance companies; (3) the applicant depended on the clinic for referrals as the clients belonged to the clinic; (4) the applicant had no share in the business; (5) the applicant was an integral part of the business as he was the sole provider of certain services; (6) the clinic had oversight of the applicant's appointments; (7) the clinic provided the applicant with equipment – The Board was not persuaded by the fact that the clinic did not withhold and remit income tax and other statutory employment deductions and that the applicant declared his income as self-employed because the Board found the substance of the relationship more important than the structure of compensation – Based on this analysis, the applicant was an employee – Application allowed

1139613 ONTARIO LIMITED O/A ACTIVE THERAPY & SPORTS CLINIC; JINSONG LI; DIRECTOR OF EMPLOYMENT STANDARDS.. 1

Health and Safety – Reprisal – The worker refused to drive a replacement truck he was provided because he alleged it was unsafe to transport steel – He testified the steering was loose, the conditions of the mirrors made it difficult to change lanes; there was no engine brake (or Jake brake) and there were exposed wires from the dashboard – The worker advised the company he would not drive the truck as it was unsafe (although he did offer to return the truck to Hamilton, without the trailer attached) and he was terminated on that day – In the face of uncontradicted evidence by the worker the Board found that the worker reasonably believed the truck to be unsafe for the purpose of hauling steel, that he refused to work as a result and that he promptly notified his employer of this refusal – The employer, rather than investigating this refusal, terminated the worker's employment which termination was motivated, at least in part, by his compliance with the Act –

Although reinstatement with full compensation was the presumptive remedy in these situations, this would not be appropriate given the unworkable relationship between the parties – Accordingly the Board ordered compensation from the date of termination to the date of hearing, plus an additional four weeks pay – Application granted

LP SERVICES; RE WADE BARBER.. 39

Health and Safety – Judicial Review – A guest at a ski resort died while swimming in an unattended pool – The Court of Appeal considered whether a ski resort was required to report a "guest injury" to the Ministry of Labour on the basis that it was a death or critical injury incurred by a person at a workplace as contemplated by subsection 51(1) of the Occupational Health and Safety Act ("Act") – The Board concluded that reporting was required because a swimming pool was a "workplace" – The Divisional Court dismissed the application for judicial review on the basis that the Board's determination was reasonable – The Court of Appeal held that the Board's decision was unreasonable – The interpretation given by the Board to subsection 51(1) that focused on location would make every place a "workplace" because a worker may be present or passing through at some time; consequently, any death or critical injury to anyone and anywhere would be a reportable occurrence, regardless of the cause – Although the Act is remedial and subsection 51(1) is intended to capture a range of injuries affecting workers, the Board's approach would expand the powers of the Ministry beyond what was intended by the legislature and is required to ensure worker safety – Interpreting the provision contextually and purposively, the words "from any cause" are to be interpreted as requiring some nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety – In addition to this nexus, reporting requirements will be triggered where the death or injury occurs at a place where a worker is carrying out his or her employment duties at the time the incident occurs or one where a worker might reasonably be expected to be carrying out such duties in the ordinary course of work; and where a worker or non-worker is critically injured – There was no evidence that the pool death was caused by any hazard that could affect worker safety – Appeal allowed

BLUE MOUNTAIN RESORTS LTD.; MINISTRY OF LABOUR, ONTARIO LABOUR RELATIONS BOARD; RICHARD DEN BOK.. 196

Judicial Review – Construction Industry – Practice and Procedure – Stay – The applicant brought a motion for an interim order to stay the decision of the Board pending judicial review – The Court applied the following three-part conjunctive test: (1) a strong *prima facie* case for review on the merits of the application; (2) irreparable harm if the stay is not granted; and (3) the balance of convenience favouring granting the stay – The Court concluded that the applicant failed to establish a strong *prima facie* case for review on the basis of a lack of procedural fairness – The Court held that: (1) there was adequate notice of the hearing; (2) the Board allowed the applicant ample opportunity to explain why the hearing should not commence in Toronto; (3) the Board gave the applicant numerous opportunities to explain why certain documents should not be produced; (4) sections 1(5) and 69(13) dealt with an obligation to produce evidence, not reverse onus, and thus, were not unconstitutional – Regarding irreparable harm, the Court did not find there was sufficient evidence to make this conclusion – The Court did state, however, that the balance of convenience was in favour of granting the stay because there were other applications before the Board based on the decision at issue, which negatively affected the applicant and had no impact on the respondents – Nonetheless, the motion was dismissed

BUR-MET CONTRACTING LTD. ET AL; RE: CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1669; ONTARIO LABOUR RELATIONS BOARD, ATTORNEY GENERAL OF ONTARIO AND ATTORNEY GENERAL OF CANADA.. 209

Judicial Review – Construction Industry Grievance – The employer brought an application for judicial review challenging the Board's decision on the meaning of the term "manufacturer's rating" in the collective agreement – The Board interpreted the term within the context of the collective agreement to hold that the purpose of the provision was to focus on the maximum capacity, rather than the performance, of the crane – The Divisional Court affirmed that the standard of review is reasonableness as conducting a contextual interpretation of a term in a collective agreement is part of the expertise of a labour arbitrator – The Court found that the Board's decision was reasonable based on the conclusion and reasons for it – The Board was not required to interpret the term in the same way as similar terms in safety regulations – Application dismissed

C.W. SMITH CRANE SERVICES LTD.; RE: INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; ONTARIO LABOUR RELATIONS BOARD.. 212

Judicial Review – Delay – The Faculty Association brought a motion for the court to dismiss four judicial reviews for delay as Mr. Khaiter, a member of the faculty of York University, had failed to set down any of the matters to be heard – These matters all relate to Mr. Khaiter's allegations that YUFA has failed to represent him fairly, which he brought to the OLRB and the HRTO – The Court noted that no date had yet been set to hear any matter and that the delays ran from two years and three months to over five years since the respective tribunal had issued its decision – The court found the delay occasioned by the failure to set any of the applications down for hearing made it clear that the delay was unacceptable – The issue then turned on whether this delay prejudiced YUFA – The court noted that the events giving rise to the original complaints go back years; "that the issues relate to employment" and that "to try and undertake these proceedings now would be disruptive and the validity of the results uncertain" – The court found the presence of prejudice obvious – The court noted however that it was uneasy dismissing the applications based on the evidence of delay, particularly because YUFA could have filed the Hearing Request Form and forced a hearing date – The court considered other factors – First it noted that Mr. Khaiter has been misusing the processes that the Board and the HRTO offer for a purpose not related to resolving the disputes at hand and that the delay in processing the four applications for judicial review is demonstrative of the same attitude and consistent with an effort to keep these disputes alive rather than bringing them to a conclusion – Second, he did not have a satisfactory explanation for the delay – The court concluded that by carrying these matters as he has, Mr. Khaiter delayed too long and lost or, by his actions, gave up the right to have the four applications for judicial review heard on the merits – Motion granted, applications dismissed

KHAITER; LABOUR RELATIONS BOARD (ONTARIO)... 214

Judicial Review – Health and Safety – A guest at a ski resort died while swimming in an unattended pool – The Court of Appeal considered whether a ski resort was required to report a "guest injury" to the Ministry of Labour on the basis that it was a death or critical injury incurred by a person at a workplace as contemplated by subsection 51(1) of the Occupational Health and Safety Act ("Act") – The Board concluded that reporting was required because a swimming pool was a "workplace" – The Divisional Court dismissed the application for judicial review on the basis that the Board's determination was reasonable – The Court of Appeal held that the Board's decision was unreasonable – The interpretation given by the Board to subsection 51(1) that focused on location would make every place a "workplace" because a worker may be present or passing through at some time; consequently, any death or critical injury to anyone and anywhere would be a reportable occurrence, regardless of the cause – Although the Act is remedial and subsection 51(1) is intended to capture a range of injuries affecting workers, the Board's approach would expand the powers of the Ministry beyond what was intended by the legislature and is required to ensure worker safety Interpreting the provision contextually and purposively, the words "from any cause" are to be interpreted as requiring some nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety – In addition to this nexus, reporting requirements will be triggered where the death or injury occurs at a place where a worker is carrying out his or her employment duties at the time the incident occurs or one where a worker might reasonably be expected to be carrying out such duties in the ordinary course of work; and where a worker or non-worker is critically injured – There was no evidence that the pool death was caused by any hazard that could affect worker safety – Appeal allowed

BLUE MOUNTAIN RESORTS LTD.; MINISTRY OF LABOUR, ONTARIO LABOUR RELATIONS BOARD; RICHARD DEN BOK.. 196

Natural Justice – Sale of Business – The Carpenters sought a declaration that RioCan had sold part of its business to RetroCom – Beginning in 1999, the Carpenters and RioCan were involved in lengthy litigation at the Board regarding a sale of properties from Burnac to RioCan – During the course of that litigation, in 2005, RioCan agreed to sell certain properties to RetroCom – When the original dispute involving the Carpenters and RioCan was concluded (2010), the union wrote to RetroCom, grieving that the latter was in violation of the Provincial Collective Agreement – RetroCom claimed that this was the first time it learned of any allegation that it was bound to the Carpenters' agreement (five years after it had purchased the property) – RetroCom moved for dismissal of the current application, claiming a denial of natural justice because it had not been given notice of the Carpenters/RioCan litigation – The Board found that the Carpenters did not have actual notice of the sale until 2010 and was not prepared to impose an obligation on the union to carry out ongoing searches of title to property that might affect its bargaining rights – Motion dismissed, matter continues

RIOCAN REAL ESTATE; THE CARPENTERS' DISTRICT COUNCIL OF ONTARIO; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA.. 129

Practice and Procedure – Collective Agreement – Remedies – Standing – Strike – When the Elementary Teachers' Federation of Ontario ("ETFO") announced its intention to have a "day of protest," the Minister of Education filed an application pursuant to section 11 of the Putting Students First Act ("Bill 115"), alleging that ETFO and its President, Sam Hammond, contravened Bill 115, the Education Act and the Labour Relations Act, 1995 by engaging in unlawful activity, and that the application was in the public's interest – The union made several preliminary objections to the application on the basis of the jurisdiction of the Board and the lack of standing by the Minister – Concerning jurisdiction, the Board declined to defer the matter to the courts because Bill 115 envisioned the Board dealing with applications alleging violations of the statute, including unlawful strikes – The union raised arguments concerning the constitutionality of Bill 115, but the Board stated that it was only determining whether a political protest was an illegal strike – The Board held that the Minister had standing to bring the application because if the protest were deemed to be an illegal strike, it would be in contravention of Bill 115 – On the merits of the application, the Board followed well-established jurisprudence that a "political strike" during a collective agreement is still an unlawful strike – The Board was not persuaded that Charter-protected speech outweighed any disruption to the labour relations scheme that would be caused by the strike – Accordingly, the "day of protest" was an illegal strike – The Board made a number of declarations and orders, including a cease and desist order from authorizing, supporting, encouraging or threatening to call or authorize an unlawful strike

ELEMENTARY TEACHERS' FEDERATION OF ONTARIO AND SAM HAMMOND; MINISTER OF EDUCATION; ONTARIO PUBLIC SCHOOL BOARDS' ASSOCIATION; ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION.. 35

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Standing – Collective Agreement – Practice and Procedure – Remedies – Strike – When the Elementary Teachers' Federation of Ontario ("ETFO") announced its intention to have a "day of protest," the Minister of Education filed an application pursuant to section 11 of the Putting Students First Act ("Bill 115"), alleging that ETFO and its President, Sam Hammond, contravened Bill 115, the Education Act and the Labour Relations Act, 1995 by engaging in unlawful activity, and that the application was in the public's interest – The union made several preliminary objections to the application on the basis of the jurisdiction of the Board and the lack of standing by the Minister – Concerning jurisdiction, the Board declined to defer the matter to the courts because Bill 115 envisioned the Board dealing with applications alleging violations of the statute, including unlawful strikes – The union raised arguments concerning the constitutionality of Bill 115, but the Board stated that it was only determining whether a political protest was an illegal strike – The Board held that the Minister had standing to bring the application because if the protest were deemed to be an illegal strike, it would be in contravention of Bill 115 – On the merits of the application, the Board followed well-established jurisprudence that a "political strike" during a collective agreement is still an unlawful strike – The Board was not persuaded that Charter-protected speech outweighed any disruption to the labour relations scheme that would be caused by the strike – Accordingly, the "day of protest" was an illegal strike – The Board made a number of declarations and orders, including a cease and desist order from authorizing, supporting, encouraging or threatening to call or authorize an unlawful strike

ELEMENTARY TEACHERS' FEDERATION OF ONTARIO AND SAM HAMMOND; MINISTER OF EDUCATION; ONTARIO PUBLIC SCHOOL BOARDS' ASSOCIATION; ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION.. 35

Status – Bargaining Unit – Certification – Construction Industry – Employee –The Carpenters applied for certification for a bargaining unit of carpenters and carpenters' apprentices in the employ of Bermingham in the ICI and non-ICI sectors – The Board initially sought to determine whether three individuals, R, P and D, were employees in the bargaining unit on the application date, and therefore should remain on the employer's Schedule A – All three individuals were engaged in "pile driving," work that the parties agreed was in the ICI sector of the construction industry, and work that triggers the application of ministerial designations – Both the Labourers and the Operating Engineers have jurisdiction for pile driving, but it is also the work of a carpenter – Employee R performed the work pursuant to the IOUE Provincial Agreement – The Board held that it makes no labour relations sense to include on Schedule A individuals employed by an employer pursuant to a collective agreement with another trade union just because the work they were performing could also be performed by members of the applicant – R was removed from the Schedule – D was employed pursuant to a collective agreement between the HAND Association of Sewer, Watermain and Road Contractors and LIUNA; it was not an ICI agreement, so D remains on the employer's Schedule A – Finally, P was properly employed in the ICI sector pursuant to the HCAT Agreement with LIUNA, but he was not a member in good standing of the Labourers for part of the relevant time – Nonetheless, remittances were made to, and accepted by, LIUNA in accordance with the HCAT Agreement, therefore he was working in the bargaining unit on the application date – P was removed from the Schedule – Matter continues

BERMINGHAM CONSTRUCTION LIMITED; THE CARPENTERS' DISTRICT COUNCIL OF ONTARIO; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; UNIVERSAL WORKERS' UNION, LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183.................................. 18

Status – Bargaining Unit – Certification – Construction Industry – Employee – LIUNA applied to certify a bargaining unit of employees in all sectors except ICI – The status of three individuals was at stake: were they covered by a subsisting collective agreement? – Three employees were required short-term on a condominium project – One employee, G, had an on-going employment relationship with Maystar; he worked in ICI immediately prior to and after the week in question – Two other employees were engaged through the hiring hall for the non-ICI work – The latter two were easily and indisputably in the applicant's bargaining unit – As for employee G, the parties' agreement that he continue in his ICI employment for the non-ICI work could not withstand scrutiny – The Board held that practice as between parties to a collective agreement may give rise to contractual issues between them, but it cannot impact on the statutory rights of the applicant – All 3 employees were found to be in the bargaining unit for purposes of the application – Certificate issued

MAYSTAR GENERAL CONTRACTORS INC.; UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183.. 51

Status – Employment Standards – Employee – The applicant sought review of the Employment Standards Officer's refusal to issue an order for unpaid wages as a result of finding that the applicant was an independent contractor, and not an employee – The Board adopted the approach in Greco Health Shack and considered various factors rather than applying a universal test – The following factors indicated the applicant was an employee: (1) the applicant's hourly rate was set by the clinic; (2) the applicant was paid by the clinic after the clinic billed its clients or their insurance companies; (3) the applicant depended on the clinic for referrals as the clients belonged to the clinic; (4) the applicant had no share in the business; (5) the applicant was an integral part of the business as he was the sole provider of certain services; (6) the clinic had oversight of the applicant's appointments; (7) the clinic provided the applicant with equipment – The Board was not persuaded by the fact that the clinic did not withhold and remit income tax and other statutory employment deductions and that the applicant declared his income as self-employed because the Board found the substance of the relationship more important than the structure of compensation – Based on this analysis, the applicant was an employee – Application allowed

1139613 ONTARIO LIMITED O/A ACTIVE THERAPY & SPORTS CLINIC; JINSONG LI; DIRECTOR OF EMPLOYMENT STANDARDS....................................... 1

Stay – Construction Industry – Judicial Review – Practice and Procedure – The applicant brought a motion for an interim order to stay the decision of the Board pending judicial review – The Court applied the following three-part conjunctive test: (1) a strong *prima facie* case for review on the merits of the application; (2) irreparable harm if the stay is not granted; and (3) the balance of convenience favouring granting the stay – The Court concluded that the applicant failed to establish a strong *prima facie* case for review on the basis of a lack of procedural fairness – The Court held that: (1) there was adequate notice of the hearing; (2) the Board allowed the applicant ample opportunity to explain why the hearing should not commence in Toronto; (3) the Board gave the applicant numerous opportunities to explain why certain documents should not be produced; (4) sections 1(5) and 69(13) dealt with an obligation to produce evidence, not reverse onus, and thus, were not unconstitutional – Regarding irreparable harm, the Court did not find there was sufficient evidence to make this conclusion – The Court did state, however, that the balance of convenience was in favour of granting the stay because there were other applications before the Board based on the decision at issue, which negatively affected the applicant and had no impact on the respondents – Nonetheless, the motion was dismissed

BUR-MET CONTRACTING LTD. ET AL; RE: CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1669; ONTARIO LABOUR RELATIONS BOARD, ATTORNEY GENERAL OF ONTARIO AND ATTORNEY GENERAL OF CANADA... 209

Strike – Collective Agreement – Practice and Procedure – Remedies – Standing – When the Elementary Teachers' Federation of Ontario ("ETFO") announced its intention to have a "day of protest," the Minister of Education filed an application pursuant to section 11 of the Putting Students First Act ("Bill 115"), alleging that ETFO and its President, Sam Hammond, contravened Bill 115, the Education Act and the Labour Relations Act, 1995 by engaging in unlawful activity, and that the application was in the public's interest – The union made several preliminary objections to the application on the basis of the jurisdiction of the Board and the lack of standing by the Minister – Concerning jurisdiction, the Board declined to defer the matter to the courts because Bill 115 envisioned the Board dealing with applications alleging violations of the statute, including unlawful strikes – The union raised arguments concerning the constitutionality of Bill 115, but the Board stated that it was only determining whether a political protest was an illegal strike – The Board held that the Minister had standing to bring the application because if the protest were deemed to be an illegal strike, it would be in contravention of Bill 115 – On the merits of the application, the Board followed well-established jurisprudence that a "political strike" during a collective agreement is still an unlawful strike – The Board was not persuaded that Charter-protected speech outweighed any disruption to the labour relations scheme that would be caused by the strike –

Accordingly, the "day of protest" was an illegal strike – The Board made a number of declarations and orders, including a cease and desist order from authorizing, supporting, encouraging or threatening to call or authorize an unlawful strike

ELEMENTARY TEACHERS' FEDERATION OF ONTARIO AND SAM HAMMOND; MINISTER OF EDUCATION; ONTARIO PUBLIC SCHOOL BOARDS' ASSOCIATION; ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION.. 35

Termination – Employment Standards – Change in Working Conditions – The applicant sought termination and overtime pay from her former employer under section 116 of the Employment Standards Act ("Act") – The applicant, a graduate student employed in a laboratory for 30 hours per week, refused to extend her employment after being presented with an employment contract containing an intellectual property clause – Regarding termination pay, the Board considered whether the employee was constructively dismissed – Based on an objective analysis, the Board found the applicant had no reason not to believe that the contract represented new terms and conditions of her employment; the applicant was informed that she had to sign the contract in order to continue employment; and the inclusion of the clause was a change in fundamental term and condition of employment – Thus, the applicant was constructively dismissed – This conclusion was not affected by the fact that the clause was included in error – The applicant testified that she regularly worked beyond 30 hours per week in order to complete her work – The applicant's entitlement to overtime pay arose under the Act and not the university's policy because the applicant never sought authorization for the extra hours worked as required by the policy – In determining whether the employee received the employment standard or a greater contractual benefit in relation to hours worked in excess of 30 hours per week, but not in excess of 44 hours per week, the Board examined whether the applicant was a salaried employee or an hourly paid employee in form and substance – Salary is used to describe a fixed periodic payment for services rendered, but other characteristics, such as variation in compensation for hours worked, should be considered – The applicant was a salaried employee because her salary did not vary with the fluctuating hours she worked in each week – Nothing in the Act entitles a salaried employee to receive additional compensation for hours that exceed the normal hours, but are less than 44 hours per week, except where the employer does not pay the salaried employee at least the prescribed minimum wage under the Act – Although the applicant was entitled under the Act to overtime pay for hours worked in excess of 44 per week, the evidence was unclear whether the applicant worked more than 44 hours in any week – The applicant was entitled to termination pay and vacation pay, but not overtime pay – Application granted, in part

SAFAA SABBAH; RE UNIVERSITY OF OTTAWA; DIRECTOR OF EMPLOYMENT STANDARDS.. 141

2462-11-ES Jinsong Li, Applicant v. **1139613 Ontario Limited o/a Active Therapy & Sports Clinic** and Director of Employment Standards, Responding Parties.

Employment Standards – Employee – Status – The applicant sought review of the Employment Standards Officer's refusal to issue an order for unpaid wages as a result of finding that the applicant was an independent contractor, and not an employee – The Board adopted the approach in *Greco Health Shack* and considered various factors rather than applying a universal test – The following factors indicated the applicant was an employee: (1) the applicant's hourly rate was set by the clinic; (2) the applicant was paid by the clinic after the clinic billed its clients or their insurance companies; (3) the applicant depended on the clinic for referrals as the clients belonged to the clinic; (4) the applicant had no share in the business; (5) the applicant was an integral part of the business as he was the sole provider of certain services; (6) the clinic had oversight of the applicant's appointments; (7) the clinic provided the applicant with equipment – The Board was not persuaded by the fact that the clinic did not withhold and remit income tax and other statutory employment deductions and that the applicant declared his income as self-employed because the Board found the substance of the relationship more important than the structure of compensation – Based on this analysis, the applicant was an employee – Application allowed

BEFORE: Kelly Waddingham, Vice-Chair.

APPEARANCES: *(Thomas) Tung-Pi Chen* and *Jinsong Li* appearing for Jinsong Li; *Derrick Fulton, Maureen Rutter* and *Joann Sturgess* appearing for the responding party; no one appearing for the Director of Employment Standards.

DECISION OF THE BOARD: January 8, 2013

1. This is an employee's application under section 116 of the *Employment Standards Act, 2000*, S.O. amended (the "Act") for a review of an Employment Standards Officer's refusal to issue an order.

2. The threshold question to be determined is whether or not Mr. Li was an independent contractor or employed by the Active Therapy & Sports Clinic ("Active Therapy or clinic"). If not, he has no entitlement under the Act, and the application must be dismissed. If I find he was employed by Active Therapy, the second issue is the amount of wages, if any, he is owed. The Board bifurcated the proceeding to make the determination of whether Mr. Li was an employee prior to hearing evidence on the second issue of what, if any, wages would be owing.

FACTS

3. Maureen Rutter, the Director of Active Therapy, testified on behalf of the clinic. Mr. Li testified on his own behalf.

4. Active Therapy provides therapeutic services, including massage therapy, physiotherapy, podiatry, chiropractic medicine and acupuncture therapy. Ms. Rutter testified that the clinicians at Active Therapy are hired as independent contractors.

5. Mr. Li became a Registered Massage Therapist ("RMT") in May 2009. On October 13, 2009, Mr. Li signed a retainer agreement with Active Therapy. The agreement provided in part:

> 2. The Retainee hereby agrees to provide therapy services to [patients of the Clinic at the Business Premises from time to time and at such times as may be mutually agreed upon between the Clinic and the Retainee. It is hereby acknowledged that the engagement herein is not of an exclusive nature and that the Retainee may provide similar services to third parties from time to time as the Retainee sees fit.
>
> 6. In conclusion for the services provided, the Retainee shall be entitled to sixty per cent (60) of all billings collected by the Clinic in respect of services provided by the Retainee to patients of Clinic. When money is collected from clients/Ins. comp. etc.
>
> 8. (i) The Retainee hereby acknowledges and confirms that all patients to which he/she provides services, shall remain patients of the Clinic and all files with respect to those patients are the sole and exclusive property of the Clinic. The Retainee hereby agrees not to copy any of the information contained in said files and not to remove any of said files from the Business Premises.
>
> 9. In consideration for its entitlement to retain forty percent (40%) of such collected billings, the Clinic in its sole and absolute discretion to be exercised reasonably, hereby covenants and agrees to provide and/or maintain to or for the benefit of the Retainee and at no charge to the Retainee, all facilities, equipment supplies and administrative services reasonably required by the Retainee in order to provide such therapy services to patients of the Clinic in a efficient and professional manner. Without restricting the generality of the foregoing, they shall include the following:
>
> (i) access to and the use of the Business Premises during business hours;
>
> (ii) the provision and use of all equipment and incidental supplies required in order to provide such services to patients of the Clinic;
>
> (iii) secretarial services including the making and/or scheduling of appointments;
>
> (iv) telephone and facsimile services;
>
> (v) …

> (vi) advertising in the telephone yellow pages;
>
> (vii) …
>
> (viii) office supplies.
>
> 11. During the term of this Agreement and for a period of three (3) years thereafter of such termination of this agreement, the Retainee will not:
>
> (a) solicit, interfere with or endeavour to entice away from the Clinic, patients of the Clinic to whom he/she has provided such Massage therapy services or any patient of the Clinic of whom he/she became aware of or acquired knowledge of, as a result of, or during the course of his/her retention by the Clinic;
>
> Independent Contractor
>
> 15. It is understood and agreed that the Retainee is an independent contractor only and is not an employee of the Clinic and it is further understood and agreed that this Agreement does not constitute a partnership, joint venture or employment agreement between the parties.

6. Mr. Li testified that originally he was to be paid 60% of his billings, but in February 2010, he entered into a verbal agreement to be paid $35.00 per hour. Ms. Rutter denies that there was any discussion about an hourly rate.

7. Mr. Li testified that he worked from 11:00 a.m. to 7:00 p.m., and was required to remain at the clinic during those hours. According to Mr. Li, he worked at the clinic Monday thru Thursday from October 2009 to January 2010, and Tuesday thru Thursday in February 2010.

8. Ms. Rutter testified that Mr. Li was able to come and go as he pleased as long he notified Active Therapy and did not have any clients booked.

9. The clinic scheduled all initial appointments for Mr. Li. If a repeat appointment was required based on Mr. Li's assessment, it would be booked with Mr. Li and the clinic's receptionist.

10. Mr. Li testified that Active Therapy provided him with all of the equipment for his appointments, except for the massage oil. Ms. Rutter testified that Mr. Li was required to bring all of his own massage equipment, including the bed, sheets, towels and oils.

11. The clinic billed clients or their insurance company for the services rendered by Mr. Li. Mr. Li's registration number would appear on the account. The client or the insurance company would pay the clinic.

12. Mr. Li was permitted to, and did in fact, work as a massage therapist for other clinics and for himself while he was working at Active Therapy.

13. At all material times, Mr. Li was the only massage therapist on staff at Active Therapy.

14. Nothing was deducted from Mr. Li's remuneration for purposes of income tax, employment insurance or the Canada Pension Plan. Mr. Li provided copies of his income tax return for 2009 in which he declared all income as a self employed individual and took the deductions for a self employed individual.

Analysis and Conclusions

15. The first issue which the Board must determine is whether or not Mr. Li was an employee or an independent contractor. If he was an independent contractor, then he has no entitlements under the Act. This is a question to be determined by examining the substance of the relationship, not its form. Ultimately, the question is whether in performing the work he was engaged to perform by the clinic, Mr. Li was performing it as a person engaged in business on his own account. If so, he was an independent contractor. If not, then he was an employee within the meaning of the Act.

16. Subsection 1(1) of the Act defines an employee and an employer as:

> "employee" includes,
>
> (a) a person, including an officer of a corporation, who performs work for an employer for wages,
>
> (b) a person who supplies services to an employer for wages,
>
> (c) a person who receives training from a person who is an employer, as set out in subsection (2), or
>
> (d) a person who is a homeworker,
>
> and includes a person who was an employee;
>
> "employer" includes,
>
> (a) an owner, proprietor, manager, superintendent, overseer, receiver or trustee of an activity, business, work, trade, occupation, profession, project or undertaking who has control or direction of, or is directly or indirectly responsible for, the employment of a person in it, and
>
> (b) any persons treated as one employer under section 4, and includes a person who was an employer;

17. In *2006515 Ontario Inc. (c.o.b. Greco Health Shack)*, [2005] O.E.S.A.D. No. 34 (January 12, 2005), the Board made the following observations concerning the question of employee status:

> 37. The test to be applied in determining whether an individual is an employee or an independent contractor at common law was recently reviewed by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983. The Court reviewed the various tests which have been articulated at common law over time: the "control test"; the "fourfold test"; and the "organization test" or "integration test". The Court noted the difficulties which have emerged from the application of each of these tests. Of note, with respect to the "organization test", the Court referred favourably to the following statement by MacGuigan J.A. in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553:
>
>> Of course, the organization test of Lord Denning and others produces entirely acceptable results when properly applied, that is, when the question of organization or integration is approached from the persona of the "employee" and not from that of the "employer," because it is always too easy from the superior perspective of the larger enterprise to assume that every contributing cause is so arranged purely for the convenience of the larger entity. We must keep in mind that it was with respect to the business of the employee that Lord Wright [in *Montreal v. Montreal Locomotive Works Ltd.* [1947] 1 D.L.R. 161] addressed the question "Whose business is it?" [Emphasis added [by the Supreme Court of Canada].]
>
> 38. The Court concluded (at paragraph 46) that: "there is no conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor". The Court continued, however, as follows:
>
>> Para. 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in Market Investigations, supra [*Market Investigations Ltd. v. Minister of Social Security* [1968] 3 All E.R. 732]. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>>
>> Para. 48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The

> relative weight of each will depend on the particular facts and circumstances of the case.
>
> 39. Finally, it is important to note that whether or not an individual is an employee or an independent contractor is a question of law to be determined after consideration of all of the relevant factors. The intention of the parties is relevant only to the extent that it is reflected in the actual arrangements they have made with each other in structuring their relationship. Put another way, the parties cannot by their "agreement" render the relationship of an employee an independent contractor or vice versa: see for example *Greypoint Properties Inc.* [2000] OLRB Rep. May/June 479 at paragraph 15.

18. I agree with and adopt the approach articulated in the *Greco Health Shack* decision. Despite some credibility issues with both parties, I find that Mr. Li was an employee of the clinic.

19. Although not determinative, the manner of Mr. Li's remuneration would be an indicator of whether or not he was an employee. However I was not provided with any documentary evidence as to whether Mr. Li received a percentage of the fee for his service or an hourly rate other than conflicting oral evidence.

20. The fact that the clinic did not withhold and remit income tax or other statutory employment deductions on his behalf and that Mr. Li declared his all income as self employed favours the clinic's position that Mr. Li was not an employee. Having said that, it is not a factor that has traditionally held much sway in the Board's jurisprudence. The Board is more interested in the substance of the relationship than in the manner in which the parties structure their compensation arrangements.

21. Based on the evidence before me I am satisfied that Mr. Li was not in business for himself. The clinic set the hourly rate that clients paid for Mr. Li's services. The clinic billed the clients or their insurance company and received the payment for Mr. Li's services. The clinic then paid Mr. Li.

22. The business and its clients belong exclusively to the clinic. Paragraph 8 of the retainer agreement provides that of the "patients to whom he/she provides services shall remain patients of the clinic and all files with respect to those patients are the sole and exclusive property of the clinic." Paragraph 11 of the retainer agreement is a non-compete clause which provides that during the term of the agreement and for three years thereafter, Mr. Li will not "solicit, interfere with or endeavour to entice away from the clinic, patients of the clinic to whom he/she has provided such massage therapy services…"

23. Mr. Li was dependent on the clinic for client referrals which he saw at Active Therapy. Therefore his opportunity for profit was determined in great part by Active Therapy.

24. Mr. Li had no share of the clinic's business or any discretion in the manner in which it was conducted.

25. During Mr. Li's tenure at the clinic there were no other RMT working at the clinic. If Mr. Li decided not to work on a given day, as Ms. Rutter claims he was free to do, there would be no other therapist available to provide massage therapy services. As such, Mr. Li was an integral part of Active Therapy's business which is a strong indication that he was an employee.

26. I am satisfied that the clinic exercised considerable control over Mr. Li's schedule. Ms. Rutter testified that Active Therapy would schedule all initial appointments; however, any subsequent appointments would be booked by Mr. Li. Active Therapy submits that this arrangement evidences Mr. Li's control over his schedule. I disagree.

27. Both paragraph 9 of the agreement and the evidence was that bookings of returning clients were scheduled both with Mr. Li and the clinic's receptionist at Active therapy. Therefore, the clinic had oversight of Mr. Li's appointments, including returning clients.

28. There was conflicting evidence as to who provided the massage equipment that Mr. Li used at Active Therapy. Ms. Rutter testified that Mr. Li provided the massage table, sheets, towels and oil. Ms. Rutter's testimony is in direct conflict with Article 9 of the employer's retainer agreement:

> In consideration for its entitlement to retain forty percent (40%) of such collected billings, the Clinic in its sole and absolute discretion to be exercised reasonably, hereby covenants and agrees to provide and/or maintain to or for the benefits of the Retainee and at no charge to the Retainee, all facilities, equipment supplies and administrative services reasonably required by the Retainee in order to provide such therapy service… they shall include the following:
>
> ii) the provision and use of all equipment and incidental supplies required in order to provide such services to patients of the Clinic

29. It would seem to defy common sense that Mr. Li would bring sheets, towels and a massage table to the clinic. I find that the clinic provided Mr. Li with the equipment including a massage table, sheet and towels which were required to perform his job.

DISPOSITION

30. Based on the above analysis, and in consideration of the remedial nature of the Act, I find that Mr. Li was an employee of Active Therapy.

31. I direct the parties to meet with a Labour Relations Officer to attempt to resolve the issue of remedy. Should the parties be unable to resolve this matter by February 15, 2013, it will be referred back to the Registrar to be set down for a hearing on the issue of remedy.

0638-12-R The International Union of Painters and Allied Trades, Local Union 1891, Applicant v. **Aquicon Construction Co. Ltd.**, Responding Party.

Certification – Construction Industry – Employer – When the general contractor on a worksite required employees to perform some deficiency work after the subcontract with a unionized employer had been completed, the unionized employer, who had no employees available to do the work, suggested to the general contractor that he call the hiring hall directly to secure workers – The union applied for certification for the workers employed doing the deficiency work – The Board held that the employer for purposes of the application for certification was the general contractor, notwithstanding that the payments and remittances for the workers were channelled through the subcontractor – Certificate issued

BEFORE: David A. McKee, Vice-Chair.

APPEARANCES: *Graham Williamson, Greg Smith, Don Benoit, Marc Michael* and *Jason Michael* appearing for the applicant; *Andrew Reynolds* and *Joe Gizzarelli* appearing for the responding party.

DECISION OF THE BOARD: January 11, 2013

1. This is an application for certification brought pursuant to the construction industry provisions of the *Labour Relations Act, 1995*, S. O. 1995 ch.1 as amended ("the Act"), and in particular section 128.1 of the Act. The applicant ("the Union") says there were three employees in the bargaining unit on the application date. Aquicon Construction Co. Ltd. ("Aquicon") says there were none. In this case, the issue comes down to the status of three persons who worked and were employed by some entity as drywall tapers. They were all at the Stoney Creek Recreation Centre ("the Recreation Centre") site on May 25, 2012, the application date. There is no dispute that they were at work on May 25, 2012 and that they were performing the work of drywall tapers, and all were employees within the meaning of the Act. The only issue is whether they were employed by Aquicon or by a drywall sub-contractor, Lorcon 2000 Inc. ("Lorcon").

2. Aquicon was the general contractor for the construction of the Recreation Centre. It issued a subcontract to Lorcon for the installation of drywall. It believed Lorcon was bound to the Provincial Collective Agreements of both the Carpenters' Union and the Painters' Union. (Indeed, Lorcon and the Painters thought so too, although there was a successorship issue that was not controversial and has since been formalized.) Lorcon's subcontract was substantially completed on or about April 30, 2012. It submitted an invoice at that time claiming that the work was 100% complete. It filed a number of other invoices after that for extras only. Aquicon later discovered that there were some deficiencies and also some additional work to perform to repair damage caused by subsequent trades that enlarged openings for other utilities (ducts and so on).

3. Joe Capriotti, Project Manager for Aquicon called Dominic Lorusso of Lorcon asking him to return to the site to perform the extra work and the deficiencies. Mr. Lorusso said he

could not do the taping work with his own forces. Lorcon used, almost invariably, a two-person crew whom it retained as a subcontractor to perform the labour for taping work. Mr. Lorusso referred to them throughout as Asif/Ali. These two persons had moved on to another project and were not available. Hence, Mr. Lorusso said he would be unable to supply any labour to the site.

4. In chief Mr. Lorusso said that he asked Mr. Capriotti to call the Union. He said "I told Joe to call for what he needs. I am too far away" He did not say where he was but was obviously able to communicate by telephone. Later he said "I told Joe to call the hall for tapers. Joe was running the job. He knows what he needs" And again later "he [Mr. Capriotti] was in charge of the employees" At no time did he testify that he had told Mr. Capriotti that he would employ such persons.

5. Mr. Lorusso in fact had no idea of who was hired. He did not visit the job site initially. He attended one day when two of them were working together. He asked them who they were and who they were working for. They replied they were working for Aquicon. His reaction was "this is my job my guys did this work". His explanation for this statement was not entirely clear. He seemed to be concerned at that point with the prospect that someone else was doing something that he regarded as part of "his" job. In any event he agreed he did not know the names of the employees Mr. Capriotti had hired until he received a fax from him indicating the names and the number of hours of work. By that time the three employees were no longer on the site.

6. Mr. Capriotti's evidence was similar to that of Mr. Lorusso. He said that Mr. Lorusso simply refused to supply men, and advised him to call the two unions to obtain two drywallers from the Carpenters' Union (a detail Mr. Lorusso did not mention) and a "couple" of tapers from the Painters. Mr. Capriotti agreed that Mr. Lorusso did not use words like "on my behalf" or "for me" but that is what he testified he believed Mr. Lorusso meant.

7. Mr. Capriotti called the Painters' Union. He had an old business card which he was unable to locate for purposes of the hearing but which was likely from Ken Burley. He did not remember the circumstances under which he received it, since it was likely some time ago. He told the person he called that he wished to obtain the tapers that he needed.

8. He did not dispute that it was Ken Burley to whom he spoke. He agreed that he likely said that he identified himself as Joe from Aquicon, since that is the company he works for. However he said "I said I was calling on behalf of Lorcon" He denied that he said only that he was calling for Aquicon. He testified that he said he was "absolutely" calling on behalf of Lorcon. Understandably there is no objective evidence to confirm this statement. Ken Burley testified that he had received a call from "Joe" who simply said that he was calling from Aquicon and asked them to send three tapers to the Recreation Centre site.

9. Ken Burley called three tapers to attend the site. Mr. Capriotti called Mr. Burley to say no one had arrived on May 24, 2012. Mr. Burley was anxious to follow through with supplying three employees to what he believed was Aquicon and so he called Don Benoit, a staff representative of the Union, to go to work on the site the next day and to ensure that others were

with him. He went to some efforts to track down Don Benoit to get himself and others onto the site as quickly as possible.

10. I conclude that Ken Burley's testimony about his conversation with Mr. Capriotti is to be preferred to that of Mr. Capriotti. He was immediately alerted by the call to the prospect that the Union might be able to file a certification application in respect of employees of Aquicon. He would not likely have made such efforts if he had been told that the call was for a subcontractor, particularly one with whom the Union had so little contact over the years. I do not mean that Mr. Burley's actions or beliefs are evidence that the call was made on behalf of Aquicon. He might well have been mistaken, but that was clearly what he believed. Similarly, I do not mean to suggest that his quick action deserves some sort of reward for promptness. His actions are simply evidence that he believed that he received a request from Aquicon for tapers, and that he saw the obvious advantage of responding promptly. In those circumstances, it is more likely than not that Mr. Capriotti said nothing about a subcontractor generally or Lorcon in particular.

11. I am reinforced in this view by the evidence of Mr. Capriotti in response to the recorded conversation that was held during the time he was showing the workers around the site, discussed below. Even with the recording, he had great difficulty in accepting that these were in fact the words spoken, and twice started to provide a more favourable version before correcting himself.

12. Mr. Burley's belief was not an unreasonable one in all the objective circumstances of the case. From an outsider's point of view, there was some advantage to Aquicon to proceed this way. Obviously there was no drywall or taping subcontractor on the site, because Mr. Capriotti was making the call. Aquicon wanted to have the taping work (which was not a significant amount of work) done in time for the opening of the Recreation Centre in a few days. To find another contractor to perform a very small amount of work in three or four days was not realistic. If Lorcon was not prepared to do it, then for Aquicon to perform the work with its own crew was the next most viable option.

13. In argument, counsel for Aquicon relied on the fact that Mr. Capriotti said he had made a similar call to Carpenters Local 18 for drywall carpenters. That evidence is not helpful in that Aquicon is bound to the Provincial Collective Agreement of the Carpenters' Union, as is Lorcon. That union would not have any interest in the exact employment relationship so long as the employees were paid their wages and benefits.

14. Diane Tondat is an accounting and payroll employee for Aquicon. She called the Union to ask for the rates for tapers and copies of blank remittance forms. The Union, referred her to the Administrator of the employee benefit plans. She called the office and spoke to Fred Sciulli who would not give her the information as Aquicon was not a signatory contractor. I assume that practice of refusing information is simply a way of not cooperating with non-union competitors.

15. Ms. Tondat stated that she had asked for the blank remittance sheets and the rates. She wanted the blank remittance sheets to make sure that she understood the calculation of all of the rates. She testified that she wanted the rates so that she would be able to verify any invoices from Lorcon (she agreed that she did not say this to Mr. Sciulli). She did not remember which invoices she was concerned with, and whether they were in existence or anticipated. Invoice #11, dated June 30, 2012 is entitled "as per site instructions" Aquicon produced a number of invoices from Lorcon dated June 30, 2012 for various extras that had nothing to do with the work performed by the three employees in question in this application. Hence, her work would require her to try to obtain some idea of Lorcon's costs even aside from the final bit of work.

16. I draw no inference at all from this evidence. Ms. Tondat was an accounting person who is simply doing her job of verifying invoices. Invoices had been submitted on April 30 and more invoices were going to be coming sometime in the future. The fixed price contract had been completed. There was no negotiation about extras that was put into evidence so Aquicon needed to have some idea of what it was being billed for. She did not remember who asked her to call and she was certainly not aware of anyone else's intentions. Her evidence, and that of Mr. Sciulli on the same issue, is of no significance at all.

17. The three tapers appeared for work on the site on May 25, 2012. They reported to Mr. Capriotti. He asked them to fill out their names addresses and social Insurance Numbers and bank information on a piece of paper. I accept Mr. Capriotti's evidence that it was simply a blank piece of scrap paper. I do not accept the evidence of the three employees who stated that it was on the letterhead of Aquicon or that they were asked to fill out TD-1 income tax forms. No doubt this is the sort of information they provide on every job to which they have ever reported. This is the sort of information any employer needs for a payroll. Mr. Capriotti said that the employee information was simply written on a scrap of paper. Whatever else might be on that scrap of paper, clearly there would have been other documents in the office with Aquicon's name on them. Indeed, Mr. Benoit helped himself to one of Mr. Capriotti's business cards that were sitting on the desk. What is significant is that Mr. Capriotti said nothing about Lorcon or about any other contractor who might be their employer. Mr. Capriotti did not say that he did.

18. Mr. Capriotti said that he sent the information to Lorcon, which is obviously the case since the pay cheques and invoices that followed came from Lorcon to Aquicon . He said the documents themselves have been lost, despite their obvious importance for this case.

19. What is significant about this evidence is that it was Aquicon collecting the kind of information that only an employer responsible for payroll would collect, and at no time did Mr. Capriotti identify any other party for whom the employees would be working or on whose behalf he was collecting the information. It was eminently reasonable for the three employees to conclude that they were hired by Aquicon . Indeed, there could be no other conclusion based on what they had seen and heard.

20. Mr. Capriotti showed the employees around the site. The materials they were to use had been left on the site by Lorcon, and were stored in the entranceway area on the first floor, as was the equipment from a number of other contractors. Mr. Capriotti showed them the material

but again did not say that these were Lorcon's materials. There was nothing on the equipment or taping materials that identify them as Lorcon's or anyone else's.

21. The employees worked for varying amounts of time over three days. During that time they receive nothing that identified their employer. Cheques were issued by Lorcon which were stated to be "for the week ending June 1, 2012" and were dated June 4, 2012. Lorcon also issued a Record of Employment to each one of them on June 4, 2012. As noted, Lorcon's invoice respecting that work is dated June 30, 2012.

22. When Mr. Capriotti was showing the three tapers around the site and identifying the work that needed to be done he was asked specifically about who the employer was. Mr. Capriotti went to some lengths to give the impression that it was a general contractor, which in this case could only have been Aquicon, for whom the tapers would be working. Mr. Benoit had a concealed voice recorder on his person during this tour of the job site. Much of the discussion was concerned with the work that needed to be done. At one point, Mr. Benoit turned the conversation to the issue of who the employer was. This portion of the agreed transcript of the recording reads as follows:

> Don Benoit: So Joe, we are working for you guys?
>
> Joe Capriotti: You are working for me…
>
> Don: Aquicon?
>
> Joe: Aquicon.
>
> Don: Okay, so well, um…it doesn't matter.
>
> Joe: What? What do you need?
>
> Don: I just wondered what your rate is.
>
> Joe: Well whatever the rate is, … whatever the Union rate…
>
> Don: Okay
>
> Joe: …whatever the union rate…
>
> Don: Fine
>
> Joe: Whatever the Union rate is…
>
> Don: Okay.
>
> Joe: We have a union agreement with the local, right, and so whatever the rates are, …are what they are.

Don:	Oh, okay, its just the, um, the first time I've worked for a, for a, …
Joe:	A general contractor.
Don:	Ya, I've never worked for a general contractor.
Joe:	Yep, whatever the rates are.
Don:	Alright, cool.

23. I accept the Employer's submission of that the questions were not innocent and were fishing for a particular answer. On the other hand Mr. Benoit sounds very nervous about raising the issue and his interruptions were made in the sense of one who is afraid he has been too aggressive and was trying to back quickly away. There is certainly nothing manipulative or duplicitous about the questions that are asked. They were very straightforward questions. The questions ask for a clear answer and a clear answer was given. It would have taken no effort and no particularly complex thought simply to say "you're working for me on this site or under my instructions, but will be paid by our drywall subcontractor" or "by Lorcon"

24. The reason for this refusal to name Lorcon is not self-evident. Mr. Lorusso was certainly clear that it was "his job" and was adamant that he was entitled to a profit coming from it. His alleged concerns about warranties ring false given when he made no attempt to supervise the job or to ensure anything at all about the quality of the work being performed by persons whom he would identify as "his employees" His immediate problem was that Asif/Ali were no longer available, having moved on to another job. As a Union contractor, Lorcon would have been entitled to call the Union hall to request that tapers be sent to any project on which it was operating.

25. The reality is that Lorcon had been flying below the radar with respect to the Union for some time. It was not formally bound to the collective agreement (although Mr. Lorusso put no emphasis on that fact); he had subcontracted work to Asif/Ali on this and other jobs, neither of whom were members of the Union nor bound to a collective agreement with the Union; it has filed no remittance reports for years. A call to the hall for tapers might raise questions about what work Lorcon had been doing for the past number of years. More significantly, if three members of the Union had come to the site, there might well be questions about who had done the work before they arrived, especially if the knowledge that something had been done were combined with the knowledge that Lorcon had filed no remittance reports for years.

26. That would certainly explain Mr. Lorusso's reluctance to staff the project at the end of May with tapers referred from the Union, and that is a fair deduction from the answers he gave on the stand. What of Joe Capriotti's motivation? His decision, which can only be called conscious, not to reveal the name of the subcontractor and to give both the Union and the three tapers the impression that they would be working for Aquicon is consistent with someone who is co-operating with Mr. Lorusso in that sort of scheme. On the stand, Mr. Capriotti was asked why he had given the answers that he did to the three tapers identifying the employer as a general contractor. His explanation was:

> "I didn't know what the rates were. Dominic had them and I assume that there was a Union in place." and
>
> "I don't know why. I was very busy getting ready for the launch. There were a lot of people getting a lot done. I am not sure exactly what I said or did".

27. This explanation is not one to which I can give much credence. He did say "you will get whatever the Union rate is", but he did not identify even then that there was a subcontractor. Mr. Benoit's questions were no doubt designed to elicit from him a statement about who the employer was, but there was nothing underhanded or manipulative about the way the questions were asked. They were simple questions to which a straightforward answer could have been given. Mr. Capriotti indicated that it was Aquicon, not Lorcon. I must therefore conclude that the concealment of Lorcon was deliberate. He intended to conceal the identity of Lorcon and to give the Union and the tapers the impression that they were working for Aquicon.

28. Aquicon's submission is that it had agreed with Lorcon to act as its agent, and that all of its actions were in that capacity. It asserts that the Union ought somehow to have known that they were acting in that capacity, although I find that there is no basis for coming to that conclusion. It acknowledges that the Union might reasonably have thought that it was acting on its own behalf, but only because it was unaware of all the facts. The difficulty with this theory is that it does not explain Aquicon's actions up to the date that the application for certification was delivered to it.

29. The Union, of course, disputes the proposition that there was ever any sort of understanding between Mr. Capriotti and Mr. Lorusso. In its view, Aquicon always intended to be the employer. Instead of simply demanding that Lorcon come back to fix its own deficiencies, and perhaps negotiate an "extra" with it (which is what one would expect a general contractor would prefer to do and would do whenever possible), it simply had three tapers do the work, expecting to back charge Lorcon for the cost. Since Mr. Conforti came to Aquicon from a drywall contractor, and had managed contracts for the drywall contractor for 11 years, he would have been (and was) comfortable managing that small portion of work. On the Union's theory, it was only after Aquicon received the application for certification that he contacted Lorcon to arrange to have paycheques issued and invoices produced. Since Lorcon was not in a position economically to say a "no" to Aquicon in such matters, it complied.

30. The Union's theory rests on what Joe Capriotti said or did before the application was filed. His lack of explanation as to where he obtained the telephone number of the Union and his inability to explain why he did not identify a subcontractor (by name or otherwise) when asked directly by Mr. Benoit, tend to undermine his testimony that he was acting on Lorcon's behalf. What it really comes down to is an assessment of documents, all of which were created after the time when he had received the notice of the Union's application. By their very nature such documents can have no corroborating effect. There is nothing that assists the Board in ascertaining whether the documents represent the completion of a process that Aquicon and Lorcon had agreed upon before the three tapers were hired, or whether they were created after the event in an attempt to shield Aquicon from this application.

31. Aquicon relied on several decisions of the Board that deal with an analysis of who the "true employer" is in a situation where it is unclear, over the course of a person's employment, which of two or more employers has the ultimate degree of control over the working life of the employee. Thus the Board has looked to which of two employers had the "fundamental control" of the employment relationship (*Monarch Corp.*, [2008] OLRB Rep. Jan./Feb. 76). Sometimes the analysis is stated to be which entity, having regard to the proper establishment of a meaningful bargaining relationship for the purposes of the Act, exercises the "greater amount of control over all aspects of the work" on the facts of each case (*B.M. Metals Services Inc.* [2012] OLRD No. 3655 and *Jackson Roofing GTA Inc.* [2008] OLRD No. 5284).

32. While these cases are not particularly helpful, even on that analysis, this case law does not assist Aquicon. Lorcon had no contact whatsoever with these employees. Mr. Lorusso did not even know who they were when he bumped into them on the site. The only time the employees were even conscious of the existence of Lorcon was after they had ceased to be employees of anyone. There is no sort of control that emanates from Lorcon at all. Even the wage rate that was discussed during the tour of the site was set by Mr. Capriotti as "the Union rate"

33. However, these decisions are not directly relevant to the issue in this case. The issue really comes down to the formation and the execution of the employment contract. It is not a question of which of two entities with some degree of control over the employment relationship exercises a greater or more meaningful control. As far as the employees knew, Lorcon had nothing to do with their employment relationship whatsoever. Mr. Capriotti made no attempt to inform the employees of Lorcon's existence, despite the number of times when that opportunity arose. If nothing else, employees ought not to find that they have agreed to work for one employer, only to find that the benefits of working for the employer vanish when another entity is substituted in its place after their employment ends.

34. The three employees worked for a very short time. The last of them worked only three days until May 29, 2012. There was no indication at all from Aquicon or from Mr. Capriotti before Aquicon filed its response to the application for certification on May 31, 2012 that it was not the employer of the three individuals. Not until June 4, 2012, when the paycheques were issued did Lorcon identify itself as the employer of the three tapers. All of the evidence leads me to conclude that either Aquicon was deliberately masking Lorcon's role, or that Lorcon's role did not exist until Aquicon received the application for certification. I see no reason why there should be a difference between the two for the purposes of this application. Aquicon, in the person of Mr. Capriotti, held itself out to the Union as an employer willing to hire three tapers; it confirmed this to the three tapers on the site when giving them instructions. Mr. Capriotti did nothing that would indicate he was acting as an agent on behalf of anyone else. There is no reason to require the employees or a Union to look behind the situation deliberately created by an employer, particularly when such evidence is entirely within the knowledge of the employer and another business, and which depend for their proof on documents created after the application was served on the employer.

35. In this case Aquicon held itself out as a business willing to hire tapers. It took all the steps that an employer would take in order to induce individual tradespersons to come to a site and to perform construction work on its behalf. It did nothing to contradict that representation, and indeed positively asserted that it was the employer. It was only after the application was served on Aquicon that it suggested otherwise. Once an employer has taken all these steps, there is no reason not to hold Aquicon to the consequences of its own actions. There is certainly no reason to permit any employer to substitute another entity for itself after the fact.

36. I conclude therefore that Aquicon is the employer of the three tapers, and all three of them were employees in the bargaining unit on the date of application. As a result, the Union succeeds in its desire to place those three individuals on the list of employees in the bargaining unit on the application date. Since there were no other employees in the bargaining unit, the Union has demonstrated membership evidence on behalf of more than 55% of the employees in the bargaining unit.

37. Although common law doctrines have no immediate application to this analysis, this decision is consistent with what I understand to be, in general terms, the position of an agent in law. It appears to me to be a valid if overly general statement of the law to say that a party who enters into an agreement on behalf of an undisclosed principal may be sued as a principal (although the other party may also sue the principal if it discovers the identity of that principal) (see *Friedmann Equity Development Inc. v. Final Note Ltd.* [2000] 1 S.C.R. 842). *Prima facie*, a party is personally liable on a contract if he puts his unqualified signature to it (*Rothwell Corp. v. Amstel Brewery Canada Limited* (1991) 6 O.R. (3d) 651. It may only escape liability on the basis of its status as an agent if it has communicated its status as agent, no matter how briefly, to the other party.

38. Those principles are of limited assistance to the issue in this case, since there was no default in receipt of the benefit of the bargain, in the sense of specific working conditions or payment of wages or benefits. An application for certification as bargaining agent for a bargaining unit of employees is not an action for a breach of contract. The issue is, at the time the work was being done, i.e., when the contract was being entered into and fulfilled, who was the employer for purposes of the *Labour Relations Act*? That is the question that must be determined without reference to speculation about future events of actual or potential defaults.

39. The purpose of establishing the answer to that question is not simply to ensure the proper payment of wages. The issuance of a certificate determines the orderly collective bargaining over terms and conditions of employment for the future, and for that reason needs to be firmly rooted in the facts that exist on the date the application was made. In this case, orderly collective bargaining cannot take place if the identity of the employer is a shifting target, subject to variation as the interests of one party or the other change.

40. In a decision dated June 4, 2012, the Board found, pursuant to section 158(1) of the Act, that all painters and painters' apprentices in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of the responding party in all

other sectors of the construction industry in the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the responding party appropriate for collective bargaining. For the purposes of clarity, the Board notes that drywall tapers are included in the bargaining unit.

41. On the basis of only the information provided in the application (including the information and membership evidence filed by the applicant), the information provided under subsection 128.1(3) of the Act) and the findings made in this decision, the Board is satisfied that more than 55% of the employees in the bargaining unit were members of the applicant on the date the application was filed. The applicant filed membership evidence on behalf of three persons, all of whom the Board finds are employees in the bargaining unit.

42. The applicant has asked that it be certified pursuant to section 128.1 relying solely on the number of persons in the bargaining unit who are members of the applicant. It is entitled to do so under section 128.1. There is nothing raised in this case that would cause the Board to consider directing a representation vote.

43. The Board has received no objection from any employee within the time set in the Notice to Employees provided to the responding party for posting.

44. The Board is satisfied that it should certify the applicant.

45. Section 128.1(24) of the Act, which states as follows, provides for the issuance of more than one certificate if the applicant has the requisite support:

> If an election under this section is made in relation to an application for certification that relates to the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 126,
>
> ...
>
> (b) if the Board certifies the trade unions on whose behalf the application for certification was brought as the bargaining agent of the employees in the bargaining unit under clause (13)(a), it shall issue one certificate that is confined to the industrial, commercial and institutional sector and another certificate in relation to all other sectors in the appropriate geographic area or areas;
>
> ...

Therefore, pursuant to section 128.1(24) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the International Union of Painters and Allied Trades and the Ontario Council of the International Union of Painters and Allied Trades in respect of all painters and painters' apprentices in the employ of Aquicon Construction Co. Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

46. Further, pursuant to section 128.1(24) of the Act, a certificate will issue to the applicant trade union in respect of all painters and painters' apprentices in the employ of Aquicon Construction Co. Ltd. in all sectors of the construction industry in the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman. For the purposes of clarity, the Board notes that drywall tapers are included in the bargaining unit.

47. The responding party is directed to post copies of this decision immediately in a location or locations where they are most likely to come to the attention of individuals in the bargaining unit. These copies must remain posted for a period of 30 days.

2916-11-R The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Applicant v. **Bermingham Construction Limited**, Responding Party v. Universal Workers' Union, Labourers' International Union of North America, Local 183, Intervenor.

3179-11-U The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Applicant v. **Bermingham Construction Limited c.o.b. Bermingham Foundation Solutions**, Responding Party v. Universal Workers' Union, Labourers' International Union of North America, Local 183, Intervenor.

Bargaining Unit – Certification – Construction Industry – Employee – Status – The Carpenters applied for certification for a bargaining unit of carpenters and carpenters' apprentices in the employ of Bermingham in the ICI and non-ICI sectors – The Board initially sought to determine whether three individuals, R, P and D, were employees in the bargaining unit on the application date, and therefore should remain on the employer's Schedule A – All three individuals were engaged in "pile driving," work that the parties agreed was in the ICI sector of the construction industry, and work that triggers the application of ministerial designations – Both the Labourers and the Operating Engineers have jurisdiction for pile driving, but it is also the work of a carpenter – Employee R performed the work pursuant to the IOUE Provincial Agreement – The Board held that it makes no labour relations sense to include on Schedule A individuals employed by an employer pursuant to a collective agreement with another trade union just because the work they were performing could also be performed by members of the applicant – R was removed from the Schedule – D was employed pursuant to a collective agreement between the HAND Association of Sewer, Watermain and Road Contractors and LIUNA; it was not an ICI agreement, so D remains on the employer's Schedule A – Finally, P was properly employed in the ICI sector pursuant to the HCAT Agreement with LIUNA, but he was not

a member in good standing of the Labourers for part of the relevant time – Nonetheless, remittances were made to, and accepted by, LIUNA in accordance with the HCAT Agreement, therefore he was working in the bargaining unit on the application date – P was removed from the Schedule – Matter continues

BEFORE: Lee Shouldice, Vice-Chair.

APPEARANCES: *Mike McCreary* and *Cameron Dickson* for the applicant; *Joe Liberman* for the responding party; *James Robbins* and *Jonathan Santos* for the intervenor.

DECISION OF THE BOARD: January 24, 2013

I. Introduction

1. Board File No. 2916-11-R is an application for certification filed with the Board under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995 c.1 as amended (the "Act") that the applicant ("the Carpenters") elected to have dealt with pursuant to section 128.1 of the Act. Board File No. 3179-11-U is a related unfair labour practice complaint.

2. The application for certification was filed with the Board on December 1, 2011. By way of decision dated December 13, 2011, a differently constituted panel of the Board found the following unit of employees to be appropriate for collective bargaining:

> all carpenters and carpenters' apprentices in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the responding party in all other sectors of the construction industry the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman.

II. What This Decision Determines

3. By way of decisions dated June 11, 2012 and June 26, 2012, I determined that the question of whether three individuals (Brian Davies, Joe Porter and Richard Rivet) were employees in the bargaining unit on the application date and therefore should remain on the Schedule A list of employees filed by the responding party ("Bermingham") would be determined, if possible, by way of written submissions filed with the Board. The decision dated June 26, 2012 established a timetable for the delivery of those submissions. A subsequent decision dated July 18, 2012 amended that timetable at the request of one of the parties.

4. The parties filed those submissions with the Board. Further submissions were sought and received from the parties regarding one particular issue by way of decision dated November

14, 2012. Subsequently, at the request of Bermingham, the parties were provided with an opportunity to comment upon the applicability of *Country Green Homes Inc.*, 2012 CanLII 69889 (ON LRB), a decision of the Board that issued during November, 2012. The parties filed submissions with the Board regarding that decision up to and including December 13, 2012.

5. I have reviewed and considered all the submissions filed with the Board and the authorities cited therein. There is no dispute that Messrs. Davies, Porter and Rivet were employees of Bermingham and at work on the application filing date. This decision determines whether they were in the bargaining unit on that date.

III. The Facts

6. For the most part the facts relevant to determine the status of Messrs. Davies, Porter and Rivet as bargaining unit employees are not in dispute.

7. All three individuals were employed by and performed work for Bermingham on December 1, 2011, the application filing date. Mr. Davies and Mr. Rivet both performed pile driving work at a waste water treatment plant located at 1125 Lakeshore Road in Burlington, Ontario. Mr. Porter worked at a different site for Bermingham on the application filing date. He was located at a garbage transit station on Disco Road in Toronto, Ontario. He also performed pile driving work. The parties agree that the work performed by Messrs. Davies, Porter and Rivet at the waste water treatment plant and the garbage transit station was work in the ICI sector of the construction industry.

8. Bermingham is bound to both the Labourers' Provincial ICI collective agreement ("the Labourers' Provincial Agreement") and the International Union of Operating Engineers' Provincial ICI collective agreement ("the IUOE Provincial Agreement"). On the basis of the materials filed by the parties with the Board, it appears that on the application filing date Mr. Rivet was employed by Bermingham pursuant to, and in accordance with, the IUOE Provincial Agreement. The circumstances surrounding the employment of Mr. Davies and Mr. Porter with Bermingham on the application filing date are not quite as clear.

9. The materials filed by Bermingham indicate that contributions and remittances with respect to the employment of Mr. Davies for the month of December, 2011 were made by Bermingham in accordance with the HAND Agreement, a collective agreement between the HAND Association of Sewer, Watermain and Road Contractors and Labourers International Union of North America, Local 837 ("Local 837") that binds Bermingham. There appears to be no dispute that Mr. Davies was at all times a member in good standing of Local 837.

10. With respect to Mr. Porter, contributions and remittances with respect to his employment were made by Bermingham to Local 183 for the month of December, 2011 pursuant to the Heavy Construction Association of Toronto collective agreement ("the HCAT Agreement") that binds Bermingham to Universal Workers' Union, Labourers' International Union of North America, Local 183 ("Local 183"). Although Mr. Porter was employed by Bermingham from August, 2011 through at least April, 2012, and contributions and remittances

were made by Bermingham on behalf of Mr. Porter during that time period, it appears from the documents filed by Local 183 that, effective May 31, 2011, Mr. Porter was not a member in good standing of Local 183. That status changed to membership in good standing effective March 5, 2012, when his accrued dues owing were paid to Local 183. Further details relating to the employment of Mr. Porter by Bermingham are set out below.

IV. The Positions of the Parties

11. As noted above, the parties provided written submissions to the Board regarding the question of whether the names of Messrs. Davies, Porter and Rivet are properly included on the Schedule "A" list of employees in the certification proceeding. The written submissions filed by the parties were thorough and contained a full analysis of the case law. I set out immediately below a very brief summary of the positions taken by the parties to these proceedings.

12. The Carpenters submit that Messrs. Davies, Porter and Rivet ought to be removed from the Schedule A list of employees. Counsel notes that all three individuals were employed by Bermingham on the application filing date pursuant to a collective agreement between Bermingham and another trade union, and that remittances were made by Bermingham on behalf of each individual to the relevant trade union. As Messrs. Davies, Porter and Rivet spent the application filing date working for Bermingham pursuant to a collective agreement with another trade union, the Carpenters assert that none of those individuals should be included in the bargaining unit it seeks. Counsel relies upon *Ellis-Don Construction Ltd.*, [2004] OLRB Rep. July/August 710; *Construction Gasperino Di Iorio Inc.*, [1997] OLRD No. 2855; and *Frost Refrigeration & Air-Conditioning Inc.*, 2009 CanLII 21087.

13. Local 183 disagrees with the position taken by the Carpenters. With respect to Mr. Porter, Local 183 relies upon the fact that Mr. Porter was not a member in good standing on the application filing date. Although Bermingham made remittances for Mr. Porter that are consistent with the requirements of the HCAT Agreement, Local 183 states that it has no records to determine whether the other terms and conditions of the HCAT Agreement were applied to Mr. Porter. Counsel for Local 183 notes that the HCAT Agreement contains a provision requiring employers to hire only members in good standing. Finally, and of importance, counsel for Local 183 acknowledged that the HCAT Agreement may be applied in the ICI sector of the construction industry by virtue of a cross-over clause contained in the Labourers' Provincial Agreement.

14. Local 183 asserts that a person who is not a member in good standing of a union and who is hired contrary to a collective agreement provision cannot be said to be employed pursuant to a collective agreement for the purposes of determining bargaining unit employee status. It asserts that compliance with the remuneration and benefit provisions contained in a collective agreement does not in and of itself mean that the individual is employed in the bargaining unit covered by the collective agreement. It cites *Van Horne Construction Ltd.*, 2008 OLRD No. 3172 in support of that assertion. Here, Local 183 argues that the evidence establishes that Mr. Porter was hired in violation of the Labourers' Provincial Agreement. In those circumstances, Local 183 asserts that there was no "meeting of the minds" as between Local 183 and

Bermingham with respect to the status of Mr. Porter. Local 183 urges the Board to conclude that Mr. Porter was not employed by Bermingham pursuant to the HCAT Agreement on the application filing date.

15. With respect to Mr. Rivet, Local 183 has no knowledge of the terms and conditions of his employment with Bermingham other than the assertion made by Bermingham itself that Mr. Rivet was employed by it pursuant to the IUOE Provincial Agreement. Counsel for Local 183 asserts that there is no information before the Board as to whether Mr. Rivet is a member in good standing with Local 793, and that in the circumstances it cannot be inferred from the remittances made by Bermingham that Mr. Rivet was employed pursuant to the IUOE Provincial Agreement.

16. Local 183 argues that in these circumstances the Carpenters have not established that Mr. Rivet was employed in the IUOE Provincial Agreement bargaining unit. Local 183 asserts that the only pertinent facts are that Bermingham applied some of the terms of that collective agreement to Mr. Rivet. Given that Bermingham did hire at least one person in violation of its applicable collective agreements, Local 183 asserts that there is no basis to assume that Mr. Rivet is a member in good standing of the IUOE or that the hiring provisions contained in the IUOE Provincial Agreement were applied to Mr. Rivet. Similarly, Local 183 argues that there is no evidence that Mr. Davies was hired by Bermingham pursuant to the terms of the HAND agreement. With respect to Mr. Davies, Local 183 acknowledges that on the application filing date he was a member in good standing of Local 837.

17. Local 183 argues that pre-existing membership in a bargaining unit does not preclude an employee from being properly included in an ICI bargaining unit for carpenters. Having regard to the principle that designated bargaining agents cannot represent employees outside of their designated trades for the purpose of ICI sector work, Local 183 argues that the impact of the existence of a subsisting bargaining unit on the right of an individual employee to have a say in a representation application is different in the ICI sector of the construction industry than it is in any other sector. Relying upon the Board's decision in *The Cairn Group*, 2003 CanLII 33650, (ON LRB) counsel distinguishes the cases relied upon by the Carpenters on the basis that they were either non-ICI applications (*Gasperino Di Iorio Inc.* and *Ellis-Don Construction Ltd.*, both cited above) or ICI applications in which there was only one ICI bargaining unit at issue (*Frost Refrigeration & Air Conditioning Inc.*, cited above).

18. Counsel for Bermingham, like counsel for Local 183, asserts that none of the cases relied upon by the Carpenters in support of its argument has any application to the instant certification proceeding. Bermingham argues that none of those cases undermine its position that as long as the three individuals in dispute were performing work that falls within the scope of the proposed bargaining unit on the application filing date for a majority of their working day, those individuals are properly included on the Schedule A list of employees.

19. Counsel notes that both *Ellis-Don* and *Construction Gasperino DiIorio* were decided in the context of displacement applications, where it is obvious that any employee who is entitled to cast a ballot ought to be employed pursuant to the collective agreement that the applicant union seeks to displace. In the instant proceeding, counsel submits that the concerns are

different. It is also observed that in both *Ellis-Don* and *Construction Gasperino DiIorio* the union seeking to add to the list of individuals in dispute was the applicant union and was the same union under whose other collective agreement the individuals were employed. Accordingly, it is argued that the primary concern of the Board in those two cases was to ensure that one union could not displace another by simply relying upon the votes cast by its own members who were already referred to work with the same employer pursuant to a different collective agreement. That mischief, it is observed, does not arise in this case.

20. Counsel notes that this very point was the central issue in dispute in *Frost Refrigeration & Air-Conditioning Inc.*, cited above. He submits that the concern noted by the Board in *Frost Refrigeration & Air-Conditioning Inc.* is not at issue in this proceeding. This is not a proceeding in which a union attempts to parlay its existing bargaining rights into new or expanded bargaining units. Here, the employees in question were paid pursuant to the collective agreements of unions other than the Carpenters.

21. Counsel for Bermingham also distinguishes the *Ellis-Don* and *Construction Gasperino DiIorio* decisions on the basis that those two cases were applications that related to the non-ICI sectors of the construction industry. The instant application relates to the ICI sector of the construction industry, and thereby triggers the application of the applicable ministerial designations. It is noted that sections 153 and 158(1) of the Act provide that only the Carpenters (or one of its affiliated bargaining agents) are designated to represent carpenters and carpenters' apprentices in the ICI sector of the construction industry. As a result, it is argued that any individual performing carpenters' work on the date of application for the majority of his working day must be included within the proposed bargaining unit. Put differently, it is argued that an individual performing the work of a carpenter on the application filing date cannot be considered to fall within a Labourers or Operating Engineer bargaining unit because the ICI provincial designations do not make it possible for the Labourers or the IUOE to represent carpenters in the ICI sector of the construction industry.

22. Counsel further observes that the limitations identified above do not arise in the context of non-ICI applications such as *Ellis-Don* and *Construction Gasperino DiIorio*, in which a trade union can represent a member of any trade. Counsel notes that this very distinction is noted by the Board in the *Ellis-Don* decision, at paragraph 28.

23. In addition, counsel for Bermingham argues that the cases relied upon by the Carpenters do nothing to address its position that the three individuals in dispute were not performing work falling within the scope of the other collective agreements on the application filing date. Relying upon the Board's decision in *Van Horne Construction Ltd.*, cited above, Bermingham argues that the mere application of some or all of the terms and conditions of the other collective agreements to the three individuals in dispute is insufficient to bring them into a bargaining unit other than the proposed bargaining unit that is the subject of this application. It is argued that in the three cases relied upon by the Carpenters, the terms and conditions of the collective agreements in question were not only applied to the employees in question, but those employees were in fact performing work falling within the scope of the bargaining units covered

by the collective agreements. In this proceeding, it is asserted that the employees were not performing work falling within the scope of the other collective agreements.

24. Bermingham argues that the Carpenters have confused the issue of whether employees are being employed pursuant to the terms of a collective agreement with the question of whether employees are employed in the bargaining unit covered by a collective agreement. Here, it is argued that the employees in dispute were not performing work falling within the scope of the bargaining units that are the subject of the other collective agreements on the application filing date, even if the terms of the other collective agreements were being applied to those individuals on that date.

25. As one might expect, the Carpenters, in response, view things quite differently. Counsel notes that all three of the individuals in dispute were performing pile driving work on the application filing date. He states that a number of trades claim jurisdiction over the work of pile driving, including the Labourers and the Operating Engineers. The Carpenters argue that the fact that pile driving is not exclusive to the trade of a carpenter is a complete answer to the submissions made with respect to *Cairn Group*, cited above.

26. With respect to Mr. Porter, the Carpenters note that Bermingham, through its counsel, has previously asserted that Mr. Porter was employed pursuant to and covered by the HCAT agreement. Bermingham has also confirmed in writing to the Board that Mr. Porter was paid in accordance with the wage rates in the HCAT agreement and that remittances were made to the union on behalf of Mr. Porter pursuant to the HCAT Agreement. Counsel notes that if the terms and conditions of that collective agreement were not properly applied to Mr. Porter, Local 183 would have filed a grievance on his behalf. In the absence of a grievance, it is argued that the Board can conclude that the terms in the HCAT Agreement were applied to Mr. Porter.

27. The Carpenters argue that whether Mr. Porter was or was not a member in good standing of Local 183 is irrelevant. It is noted that the records filed with the Board establish that dues check off went to Local 183 each month, and that he was covered by the terms of the HCAT Agreement. In the alternative, if the question of Mr. Porter's standing in Local 183 does have some relevance, counsel for the Carpenters argues that it is simply too late for Local 183 to attach any legal significance to that fact. Counsel notes that the internal report filed by Local 183 indicates that Mr. Porter had been employed by Bermingham since August, 2011, four months before the filing of the application for certification. No grievance was filed by the Labourers' against Bermingham with respect to Mr. Porter not being a member in good standing during the time period August, 2011 to January, 2012. The Carpenters argue that it is inconsistent to allow Mr. Porter to work for Bermingham for those five months while not a member in good standing, and then attach some legal significance to that fact for the purpose of this proceeding. Counsel argues that Mr. Porter was suspended for failing to pay his over-the-counter dues, that many members of the Labourers are suspended for failing to do so, and that they suffer no consequences. He notes that it is commonplace in the construction industry for union members to fall behind in paying those dues.

28. Turning to Mr. Davies, the Carpenters note that Bermingham has stated that he was a member of Local 837 employed on site pursuant to the HAND Agreement, was paid in accordance with the wage rates contained in that collective agreement, and that remittances were made on behalf of Mr. Davies pursuant to that collective agreement.

29. With respect to both Mr. Porter and Mr. Davies, the Carpenters assert that, notwithstanding the submissions made by Local 183, the Board ought to conclude that the HCAT Agreement and the HAND Agreement were applied to Mr. Porter and Mr. Davies, respectively, and that each was covered by that agreement while employed by Bermingham on the application filing date, notwithstanding that the scope of the collective agreement does not apply to the job site upon which they were working.

30. Counsel for the Carpenters argues that a careful reading of *Van Horne Construction Ltd.*, cited above, supports the proposition that if the Board finds an intention on the part of the parties to apply a non-ICI agreement to work in the ICI sector, the individuals employed in the ICI sector would be in the non-ICI bargaining unit. Counsel notes that at paragraph 15 of *Van Horne Construction*, the Board stated that in the circumstances of that proceeding there was "no evidence that establishes a mutual intention to apply the provincial agreement to the employees in question"

31. In the instant application, counsel argues that there is, in fact, ample evidence to suggest an intention to apply the HCAT and HAND Agreements to Mr. Porter and Mr. Davies, respectively, while each worked on an ICI sector job site. Bermingham is bound by the Labourers' Provincial Agreement, and Local 183 acknowledged in its submissions that the HCAT Agreement may be applied in the ICI sector of the construction industry by virtue of a cross-over clause. Furthermore, Bermingham and Local 183 demonstrated an intention to apply the HCAT Agreement to ICI sector jobs by payment of remittances and wages pursuant to the HCAT Agreement. In addition, counsel notes that Bermingham asserts, in its submissions, that it has a practice of applying the HAND Agreement and the HCAT Agreement "regardless of the geographical location or type of project its employees are working on" It also notes that Local 183 has not disputed that practice, indicating its intention to apply the HAND and HCAT Agreements to the ICI projects in question. Counsel sites *Van Horne Construction*, at paragraph 24, in support of this proposition.

32. With respect to Mr. Rivet, the Carpenters reiterate that Bermingham acknowledges employing Mr. Rivet on the application filing date in accordance with the IUOE Provincial Agreement and paid remittances to Local 793 on his behalf. It asserts that the IUOE Provincial Agreement covered his employment with Bermingham and that it was applied to him. The Carpenters note that there is no evidence that Local 793 filed a grievance asserting that Bermingham had failed to apply any part of the collective agreement to Mr. Rivet.

33. The Carpenters argue that the circumstances surrounding Mr. Rivet are the easiest to analyse. He was employed by Bermingham on the application filing date performing work at a project that all agree was an ICI sector project. The IUOE Provincial Agreement applied to the project. The instant application is an ICI sector application for carpenters and carpenters'

apprentices. In light of those facts, counsel for the Carpenters asserts that Mr. Rivet simply could not have been in the Carpenters' bargaining unit on the application filing date.

V. Analysis and Decision

34. Of the cases relied upon by the parties, *Cairn Group*, cited above, is factually the closest. However, there is one significant difference between the instant proceeding and *Cairn Group*. In *Cairn Group*, the parties agreed that the work performed by the three individuals in dispute was the work of a construction labourer. The parties in that proceeding did not agree that the work performed by the disputed employees was also the work of a carpenter. As a result, the Board did not consider the possibility that the work performed by those three individuals may also have been the work of a carpenter, and determine the effect that such a finding would have had on the result. As will become evident below, in the instant proceeding it is necessary to determine how such a finding affects the result.

(a) Mr. Rivet

35. I consider first the employee status of Mr. Rivet, who the Carpenters assert performed work for Bermingham as an operating engineer pursuant to the IUOE Provincial Agreement on the application filing date. There is no dispute that on that date Mr. Rivet performed the work of pile driving. Having regard to the provisions of the IUOE Provincial Agreement (see, for example, Article 26.1 and Schedule "A" to the IUOE Provincial Agreement) there can be no dispute that members of the IUOE perform the work of pile driving in the ICI sector of the construction industry.

36. It is at this stage that the significance of the ministerial designation orders must be considered. Both counsel for Local 183 and counsel for Bermingham made reference to the designation orders in their written submissions. In particular, counsel for Bermingham argued that because the ministerial designation for carpenters provides that only the Carpenters or one of its affiliated bargaining agents can represent carpenters and carpenters' apprentices in the ICI sector of the construction industry, any individual performing carpenters' work on the application filing date for the majority of his working day must be included in the bargaining unit.

37. I disagree with that assertion. The assertion errantly assumes that any given work task can be identified as being the exclusive task of one trade for the purposes of the ICI sector of the construction industry. Pile driving is work claimed by the Carpenters in Schedule "A" of its Provincial ICI Agreement (the "Carpenters Provincial Agreement"). It is work commonly performed by members of local carpenters unions in the ICI sector of the construction industry pursuant to that collective agreement. However, as noted above, pile driving is also work claimed by the IUOE in the IUOE Provincial Agreement and performed by its members in the ICI sector of the construction industry. Furthermore, pile driving is work claimed by the Labourers in the Labourers' Provincial Agreement (see Schedule "E" to that collective agreement, and the Local Union Schedule for Local 183 appended to the collective agreement) and performed by its members in the ICI sector.

38. The position taken by Bermingham and Local 183 fails to distinguish between the representation of carpenters, operating engineers, and labourers, on the one hand, and the work performed by those same trades, on the other. In *Belmont Concrete Finishing Co. Limited*, 2012 CanLII 64194 (ON LRB), the Board made the following observation, with which I agree:

> 19. Although the designation orders issued by the Minister under section 153 of the Act do limit the designated employee bargaining agents to the representation of employees working in the relevant trade in the ICI sector of the construction industry, and may not overlap as drafted, it must always be kept in mind that the actual work performed by some trades commonly overlaps with the work carried out by other trades. Accordingly, it is quite possible that some kinds of work may be performed by two or more trades in the ICI sector of the construction industry pursuant to two or more ICI provincial collective agreements. Merely because someone is doing the work that comes within the work jurisdiction of one trade as described in that trade's ICI provincial collective agreement does not necessarily result in that individual coming within the bargaining unit represented by that trade where that individual was also covered by and working under another union's ICI provincial collective agreement while performing that same work.
>
> 20. That is how jurisdictional disputes typically arise in the ICI sector of the construction industry. Both trade unions have a legitimate claim to the work in dispute under their ICI provincial collective agreement. In proceedings of that nature, the task of the Board is to determine which trade union has the best claim to the work in dispute. It is the rare case in which one of the parties to a jurisdictional dispute relating to work in the ICI sector of the construction industry is determined to have no support at all in its ICI provincial collective agreement for its claim to the performance of that work. An application for certification is not a proceeding for determining jurisdictional dispute. Representation rights and trade jurisdiction are two distinct matters. Certification proceedings deal with the former, not the latter. See *Industrial Lighting and Contracting Limited*, [1979] OLRB Rep. Oct. 985; *Runnymede Development Corporation Limited, supra.*

39. This same distinction was overlooked by Bermingham in its written submissions regarding *Country Green Homes Inc.*, cited above. In that case, the Board was faced with two non-ICI applications for certification for construction labourers of the same employer, one relating to Board Area No. 26, and a second relating to Board Area No. 27. The employee status of 11 individuals was determined by the Board. Of those 11 individuals, three had performed the work of a construction labourer for the employer in both Board Area Nos. 26 and 27 on the application filing date. One question addressed in the Board's decision was whether those three individuals should be included on the Schedule A list for both applications.

40. The Board determined that the names of the three individuals should be placed on the Schedule A list for the purpose of both applications. The rationale for reaching that result, with which I agree, is found in paragraphs 108 and 109 of the Board's decision. Of particular significance for the purpose of these proceedings is paragraph 109, in which the Board makes the following observations:

> 109. In the final analysis, I decline to follow the earlier line of cases and agree with the analysis contained in *Silverline, Bonnechere, Terry Shortt Electrical,* and *Jamwood.* I conclude that the earlier cases have taken two "tools" for the determination of the craft status of an employee, that is the majority of time test and the rule that an employee may be in only one bargaining unit at a time, and have conflated them to an "end" to be pursued as if it were part of the statutory definition. For reasons set out in the analysis of the case law above, I do not accept the analysis contained in those earlier cases and decline to follow them. *If an employee works for an employer and performs, for a majority of time on the application date, the tasks associated with the applicant's craft unit in the geographic area covered by the application for certification, that employee is in the bargaining unit regardless of what else he or she may do outside the bargaining unit for the employer or for anyone else.* (emphasis added)

Counsel for Bermingham argues that this passage, and in particular the italicized portion of the passage, "is directly on point" Counsel asserts that because there is no dispute that Messrs. Rivet, Davies and Porter were performing the work of a carpenter for a majority of their working day on the application filing date in a geographic area and sector covered by the application for certification, the rationale underlying the Board's decision in *Country Green Homes* requires the Board in this case to conclude that Mr. Rivet and the other two employees remain on the Schedule A list.

41. Counsel's assertion is not correct. In the context of the facts before the Board in these proceedings, I am of the view that counsel for the Carpenters has properly analysed the situation in the submissions that he filed with the Board. He argues that the assertion made by Bermingham would be accurate if the Carpenters had the sole and undisputed claim to pile driving work. However, because pile driving work is not exclusively the work of the carpentry trade, and is also work properly claimed by both operating engineers and construction labourers, the passage relied upon by Bermingham is not the end of the analysis. Counsel for the Carpenters states that in these circumstances the analysis must go further, and consider whether the individuals performing the work in question on the application filing date were covered by a collective agreement encompassing that work. Counsel for Bermingham, in response, asserts that that consideration is irrelevant for the purposes of an application for certification. He states that "the only question is whether the work in question is covered by the applicant's craft jurisdiction, not whether (as is often the case) it is covered by another union's craft jurisdiction as well"

42. Again, I must disagree with the analysis relied upon by Bermingham. In a situation such as that which was before the Board in *Country Green Homes Inc.*, where there were no competing collective agreement relationships in play, the position taken by counsel for Bermingham would be correct. In that situation, the name of any employee performing work covered by the applicant trade union's craft jurisdiction for a majority of his working day on the application filing date would be properly included on the Schedule A list of employees, irrespective of whether the work he or she performed may in theory be work claimed by one or more other construction trade unions for their members. In those circumstances, Bermingham

correctly observes that it is irrelevant that other trade unions might claim the work performed by the employees in question.

43. However, applying that approach to situations in which one or more other trade unions have bargaining rights with the employer that clearly encompass the work in dispute is far too simplistic an analysis in a world where the work jurisdictions of construction trades overlap. It makes no labour relations sense to include on the Schedule A list of employees for the purposes of an application for certification those individuals employed by the employer pursuant to a collective agreement with another trade union for the sole reason that the tasks performed by those individuals are also performed by the members of the applicant's trade. Those individuals are already unionized and work for the employer in another bargaining unit. They are already represented by a trade union, and their terms and conditions of employment are already determined by an applicable collective agreement.

44. In a situation such as that faced by the Board in these proceedings, it is necessary to consider the various bargaining relationships at play. Any individual who was employed by Bermingham on the application filing date performing work that clearly falls within the scope of a collective agreement by which Bermingham is bound that is applicable to the ICI sector of the construction industry should not be included on the Schedule A list of employees for the purposes of the instant application for certification.

45. With those considerations in mind, it is evident that the name of Mr. Rivet should be removed from the Schedule A list of employees. The work performed by Mr. Rivet on the application filing date consisted of work tasks typically performed by members of the IUOE, by members of the Carpenters, or by members of Local 183 in the ICI sector of the construction industry. When performing those tasks on that date, Mr. Rivet was properly performing that work in the ICI sector of the construction industry pursuant to the IUOE Provincial Agreement.

46. I reject the various assertions made by Local 183 to the effect that the Carpenters have not established that Mr. Rivet was employed in the bargaining unit of employees governed by the IUOE Provincial Agreement. Bermingham has stated that Mr. Rivet was employed by it in that bargaining unit. The documents it has filed with the Board support that conclusion. *Prima facie*, Mr. Rivet was properly employed by Bermingham in that unit. If Local 183 asserts that Mr. Rivet was not properly employed by Bermingham in that unit, it is incumbent upon Local 183 to establish that assertion as a matter of fact. It has not done so.

47. Mr. Rivet performed work on the application filing date for Bermingham in its IUOE bargaining unit. In light of that conclusion, Mr. Rivet cannot be said to have been employed by Bermingham on the application filing date in the bargaining unit of employees sought to be represented by the Carpenters. Accordingly, the name of Mr. Rivet is removed from the Schedule A list.

(b) Mr. Davies

48. I consider next the employee status of Mr. Davies. To reiterate the salient facts relating to this individual, Mr. Davies was at all times a member in good standing of Local 837. He performed pile driving work at the waste water treatment plant located in Burlington, Ontario on the application filing date. There is no dispute that the work performed by Mr. Davies was work in the ICI sector of the construction industry. Contributions and remittances with respect to Mr. Davies for the month of December, 2011 were made by Bermingham in accordance with the HAND Agreement.

49. It is asserted by Local 183 that there is no evidence that Mr. Davies was hired by Bermingham pursuant to the terms of the HAND Agreement. Local 183 has not established that assertion. In fact, the circumstances suggest otherwise. Mr. Davies was at all relevant times working for Bermingham at the waste water treatment plant pursuant to the provisions of the HAND Agreement, and contributions and remittances were made to Local 837 in accordance with that agreement.

50. The position asserted by the Carpenters is nonetheless problematic, because the work performed by Mr. Davies on the application filing date was work in the ICI sector of the construction industry. The HAND Agreement cannot have any application to Bermingham employees who perform the work of a construction labourer that falls within the ICI sector of the construction industry. As noted previously, counsel for the Carpenters argued that a close reading of *Van Horne Construction Ltd.*, cited above, supports the proposition that if the Board finds a mutual intention on the part of the parties to apply a non-ICI agreement to work in the ICI sector, the individuals employed in the ICI sector may be found to be in the non-ICI bargaining unit.

51. I disagree with that analysis. *Van Horne Construction Ltd.* involved an application for certification for a non-ICI bargaining unit. The applicant in that proceeding had previously secured ICI bargaining rights for carpenters and carpenters' apprentices. The question before the Board in *Van Horne Construction Ltd.* was whether three individuals employed by the company on the application filing date were employed pursuant to and covered by the Carpenters' Provincial Agreement. If they were, then they could not be in the bargaining unit sought by the applicant in that proceeding, and the application would be dismissed.

52. The Board determined that the three individuals in question had not been employed in the ICI bargaining unit. In accordance with the principle established in *Ecodyne Limited*, [1979] OLRB Rep. July 629, the Board concluded that the three individuals, though paid in accordance with the Carpenters Provincial Agreement, were not actually employed in that bargaining unit on the application filing date. In the course of reaching that conclusion, the Board noted that prior jurisprudence establishes the proposition that an agreement between an employer and a union to apply a collective agreement to work or employees could have the effect of extending the trade union's bargaining rights, depending upon whether a mutual intention to that effect could be established. It is just such a mutual intention that the Carpenters' rely upon in the instant proceedings.

53. The difficulty with the argument made by the Carpenters as it relates to Mr. Davies is that it runs squarely into the statutory prohibition established by section 162 of the Act. The salient portions of section 162 of the Act provide as follows:

> **162.** (1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.
>
> (2) Subject to sections 153, 161, 163.1, 163.2 and 163.3, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

Subsection 162(1) of the Act provides that there can only be one provincial agreement covering members of the Labourers employed by Bermingham who work in the ICI sector. That agreement is the Labourers' Provincial Agreement. Subsection 162(2) of the Act provides that the Labourers and Bermingham may not conclude a second collective agreement that affects employees covered by the Labourers' Provincial Agreement.

54. As a result of section 162 of the Act, the argument urged by the Carpenters in these proceedings must fail. Although it may be possible, for the purpose of a non-ICI sector application for certification, to argue that one or more individuals are not in the bargaining unit because they were employed in an ICI sector bargaining unit on the application filing date (that is, the same argument that was made by the employer in *Van Horne Construction Ltd.*), it is not possible to make a similar argument for the purpose of an ICI sector application for certification, because the Labourers' and Bermingham may not lawfully mutually intend to apply a non-ICI sector collective agreement to ICI sector work.

55. As Mr. Davies was not employed by Bermingham in the Labourers' Provincial Agreement bargaining unit on the application filing date, could not have legally been employed by Bermingham in any other labourers' bargaining unit on that date, and was performing the work of a carpenter in the ICI sector of the construction industry on that date, the name of Mr. Davies should remain on the Schedule A list.

(c) Mr. Porter

56. The circumstances relating to Mr. Porter are the most difficult to determine. It will be recalled that on the application filing date Mr. Porter performed pile driving at a garbage transit station in Toronto, Ontario. There is no dispute that the work performed by Mr. Porter on that date was work in the ICI sector of the construction industry. Contributions and remittances with

respect to Mr. Porter for the month of December, 2011 were made by Bermingham in accordance with the HCAT Agreement.

57. There does not appear to be any dispute that Mr. Porter was not a member in good standing of Local 183 on the application filing date. Local 183 asserts that Mr. Porter was not a member in good standing when he was first employed by Bermingham in August, 2011, contrary to Article 4.01(a) of the HCAT Agreement and Article 2.01 of the Labourers' Provincial Agreement. It also states that his continued employment violated Article 4.02 of the HCAT Agreement and Article 2.02 of the Labourers' Provincial Agreement, which requires that membership in good standing be maintained as a condition of continued employment. Local 183 argues that an employee hired contrary to the HCAT Agreement and/or its Provincial Agreement cannot be said to be working within the Labourers' Provincial Agreement bargaining unit on the application filing date, and therefore that the name of any such employee must remain on the Schedule A list.

58. The fact that Mr. Porter was employed by Bermingham under the HCAT Agreement on the application filing date does not have the same effect as the employment of Mr. Davies under the HAND Agreement. As acknowledged by Local 183 in its written submissions, the HCAT Agreement may be applied to individuals performing work in the ICI sector of the construction industry by virtue of Article 1 of the Local Union Schedule for Local 183 contained in the Labourers' Provincial Agreement. Article 1.01 of that Schedule provides as follows:

> The rates and other individual employee working conditions for construction labourers engaged in pile driving, caisson and lagging operations which are set out in the Collective Agreement between Local 183 and The Heavy Construction Association of Toronto, are hereby incorporated into and form part of this Schedule.

As a result, the fact that payments were made to Mr. Porter and that remittances were made to Local 183 in accordance with the HCAT Agreement does not have the same effect as in the case of Mr. Davies. In accordance with Article 1.01 of the above-referenced Schedule, Mr. Porter's employment pursuant to the terms and conditions of the HCAT Agreement places him squarely within the Labourers' Provincial Agreement bargaining unit.

59. The one fact that distinguishes Mr. Porter from both Mr. Davies and Mr. Rivet is his standing with Local 183. Mr. Porter was not a member in good standing of Local 183 on the application filing date. Both Bermingham and Local 183 state that, as a result of that status, Mr. Porter was not properly employed by Bermingham in the Labourers' Provincial Agreement bargaining unit on the application filing date, and that he ought to remain on the Schedule A list of employees. The Carpenters, on the other hand, state that whether Mr. Porter was or was not a member in good standing of Local 183 simply does not matter in the circumstances. In the alternative, if his status does matter, the Carpenters state that Local 183 acquiesced in the situation and ought not to be permitted to rely upon Mr. Porter's status in the circumstances.

60. The documentation filed by Local 183 identifies that Mr. Porter was employed by Dibco Underground Ltd. for the better part of the two year period ending in March, 2011. Mr. Porter appears to have lost his good standing with Local 183 because his regular union dues and working dues for the months of May, June, and July, 2011 were not paid. Mr. Porter then became employed with Bermingham in August, 2011. Bermingham remitted his regular union dues and working dues to Local 183 for the months of August, September and October, 2011. In fact, counsel for Local 183 acknowledged in submissions filed with the Board that Bermingham made remittances for Mr. Porter consistent with the requirements of the HCAT Agreement. As at December 9, 2011, when the first report filed with the Board relating to Mr. Porter was printed, Bermingham had not paid the regular and working dues for Mr. Porter for either November, 2011 or December, 2011. In accordance with the terms of the HCAT Agreement, the November, 2011 regular and working dues were not due to be paid to Local 183 until the middle of December, 2011.

61. A second, more up-to-date report relating to Mr. Porter was filed with the Board by Local 183 in conjunction with its written submissions. The second report indicates that Bermingham paid the regular and working dues for Mr. Porter for the months of November, 2011 and December, 2011 on December 16, 2011 and January 16, 2012, respectively. The second report also shows that Mr. Porter was readmitted to member in good standing status with Local 183 on March 5, 2012, when his regular working dues were paid to Local 183 for the months of May, June and July, 2011.

62. On the basis of the facts set out above, I am of the view that the status of Mr. Porter as a member not in good standing of Local 183 ought not to have any significance for the purposes of the instant application for certification. Mr. Porter lost his member in good standing status because his regular union dues were not paid to Local 183 for the months of May, June and July, 2011. It is likely that for one reason or another Mr. Porter did not work during that time period. However, Mr. Porter was subsequently employed by Bermingham commencing in August, 2011. He worked with Bermingham through at least April, 2012. Bermingham remitted his regular union dues and working dues to Local 183 in a timely fashion throughout.

63. There appears to be no doubt that Mr. Porter was not a member in good standing in Local 183 during the month of August, 2011 when he first became employed by Bermingham. Articles 2.01 and 2.02 of the Labourers' Provincial Agreement require Bermingham to ensure that it employs only members in good standing of the applicable local union to perform work under that agreement. Bermingham may well have violated those provisions of the Labourers' Provincial Agreement by employing Mr. Porter from August, 2011 until his arrears in regular working dues were paid to Local 183.

64. Even if that is the case, I am of the view that Mr. Porter was employed in the bargaining unit covered by the Labourers' Provincial Agreement on the application filing date. Local 183 relies in its written submissions on the principle first established by the Board in *April Waterproofing Limited*, [1980] OLRB Rep. November 1577, and certain case law that follows that decision, including cases such as *Cooper Construction Company Limited*, (1982) CanLII 951(ON LRB), and *D.D.R. Landscape Contactors Ltd.*, 2011 CanLII 46600 (ON LRB).

65. However, it is clear that the mischief addressed by the Board in *April Waterproofing* and the other cases that apply the principle established by that decision is not present in the instant proceedings. This is not a situation in which Bermingham hired an individual off the street in contravention of the Labourers' Provincial Agreement in order to facilitate the termination of bargaining rights of a trade union. No party has asserted that Bermingham secured the services of Mr. Porter in any way except through contacting the Local 183 hiring hall. Furthermore, as at the application filing date, Mr. Porter had been employed by Bermingham for more than three full months, and remittances had been made by Bermingham to Local 183 on his behalf for the months of August, September and October, 2011. Local 183, or an agent on behalf of Local 183, had processed those remittances. It is evident from the documents filed by Local 183 that Local 183 was aware at all times that Mr. Porter was not a member in good standing and that he was continuing to work for Bermingham by virtue of the HCAT Agreement.

66. In those circumstances, the applicable jurisprudence leads one to the conclusion that Mr. Porter was in the bargaining unit governed by Labourers' Provincial Agreement on the application filing date. As noted by counsel for the Carpenters in his written submissions, the Board has declined to apply the principle established by *April Waterproofing* where the union challenging the bargaining unit status of an employee has not taken issue with the lack of good standing enjoyed by that employee, on the basis that the challenging union cannot waive its rights or ignore a known situation, only to reassert those rights when a representation application is filed. Amongst numerous authorities to that effect, decisions such as *E.R. Masonry*, [1988] OLRB Rep. July 668 (at paragraph 16), *Ideal Railing Limited*, [1988] OLRB Rep. July 674 (at paragraph 7) and *Bill Bailey of Belleville Limited*, [1992] OLRB Rep. June 673, at paragraphs 4 to 6) establish that proposition.

67. In the circumstances of these proceedings, it is evident that Local 183 was content to have Mr. Porter employed by Bermingham in its Labourers' Provincial Agreement bargaining unit under the auspices of the HCAT Agreement during August, September, October, November and December, 2011. At no time did it assert to Bermingham that regular union dues had to be paid on behalf of Mr. Porter for the months of May, June and July, 2011 in order to maintain Mr. Porter in its employment. Nor was any grievance filed by Local 183. In the face of an application for certification brought by another trade union, Local 183 cannot now assert that Mr. Porter ought to be on the Schedule A list because he ought not to have been employed by Bermingham on the application filing date.

68. Mr. Porter performed work on the application filing date for Bermingham in the bargaining unit governed by the Labourers' Provincial Agreement. In light of that conclusion, Mr. Porter cannot be said to have been employed by Bermingham on the application filing date in the bargaining unit of employees sought to be represented by the Carpenters. Accordingly, the name of Mr. Porter is removed from the Schedule A list.

VI. Conclusion

69. For the reasons set out above, the names of Mr. Rivet and Mr. Porter are removed from the Schedule A list of employees filed by the responding parties with its response.

70. Counsel for the applicant is to advise the Registrar within 10 days of the date of this decision how his client intends to proceed with these applications.

71. I will remain seized of these proceedings.

2947-12-U The Minister of Education, Applicant v. **Elementary Teachers' Federation of Ontario and Sam Hammond**, Responding Parties, v. Ontario Public School Boards' Association and Ontario Secondary School Teachers' Federation, Intervenors.

Collective Agreement – Practice and Procedure – Remedies – Standing – Strike – When the Elementary Teachers' Federation of Ontario ("ETFO") announced its intention to have a "day of protest," the Minister of Education filed an application pursuant to section 11 of the *Putting Students First Act* ("Bill 115"), alleging that ETFO and its President, Sam Hammond, contravened Bill 115, the *Education Act* and the *Labour Relations Act, 1995* by engaging in unlawful activity, and that the application was in the public's interest – The union made several preliminary objections to the application on the basis of the jurisdiction of the Board and the lack of standing by the Minister – Concerning jurisdiction, the Board declined to defer the matter to the courts because Bill 115 envisioned the Board dealing with applications alleging violations of the statute, including unlawful strikes – The union raised arguments concerning the constitutionality of Bill 115, but the Board stated that it was only determining whether a political protest was an illegal strike – The Board held that the Minister had standing to bring the application because if the protest were deemed to be an illegal strike, it would be in contravention of Bill 115 – On the merits of the application, the Board followed well-established jurisprudence that a "political strike" during a collective agreement is still an unlawful strike – The Board was not persuaded that Charter-protected speech outweighed any disruption to the labour relations scheme that would be caused by the strike – Accordingly, the "day of protest" was an illegal strike – The Board made a number of declarations and orders, including a cease and desist order from authorizing, supporting, encouraging or threatening to call or authorize an unlawful strike

BEFORE: Bernard Fishbein, Chair.

APPEARANCES: *Robert E. Charney, Len Hatzis, Rochelle S. Fox* and *Tim Hadwen* for The Minister of Education; *Howard Goldblatt, Ethan Poskanzer, Steven Barrett, Heather Ann McConnell, Sam Hammond* and *Gene Lewis* for Elementary Teachers' Federation of Ontario and *Sam Hammond; Michael Hines* and *Dolores Barbini* for Ontario Public School Boards' Association; *Simon Blackstone, Karen Ensslen* and *Pierre Côté* for Ontario Secondary School Teachers' Federation.

DECISION OF THE BOARD: January 11, 2013

1. This is an application filed by the Minister of Education pursuant to section 11 of the *Putting Students First Act, 2012*, S.O. 2012, c.11 (the "Putting Students First Act" or "Bill 115"), sections 79, 81, 83 and 100 of the *Labour Relations Act, 1995*, S.O. 1995, c.1 (hereinafter referred to as the "*Labour Relations Act*" of "the Act") and Part X.1 of the *Education Act* R.S.O. 1990, c.E.2 (the "*Education Act").* The Minister alleges that the Elementary Teachers' Federation of Ontario (hereinafter referred to as "ETFO" or the "responding party trade union" or the "responding party") and its President, Sam Hammond, have engaged in unlawful activity in contravention of these statutes, and the Minister is of the opinion that it is in the public interest for her to make application to the Ontario Labour Relations Board (hereinafter referred to as "the Board" or the "Ontario Labour Relations Board") pursuant to section 11 of the *Putting Students First Act* in connection with the withdrawal of services called for by ETFO for January 11, 2013.

Background

2. This application arises in the following context. On January 2, 2013, by Order in Council made under section 9(2)(2) of the *Putting Students First Act*, collective agreements were imposed for, among others, bargaining units represented by ETFO. These collective agreements are effective from September 1, 2012 to August 31, 2014.

3. On the afternoon of January 9, 2013, ETFO announced its intention to have its members engage in a "day of protest" or "political protest" on Friday, January 11, 2013, which is a regular school day. The president of ETFO, Sam Hammond, indicated that the January 11, 2013 action would be a "full day" that would involve the full day withdrawal of services by ETFO's membership on a province-wide basis. In explaining the "day of protest" to its membership prior to conducting a vote to "authorize it", ETFO advised its members on its website that they would lose one day's salary and one day of pensionable service by engaging in the one-day province-wide "day of protest", not hiding the fact that the "day of protest" involves the withdrawal of services.

4. As a result of the announcement by ETFO on January 9, 2013, it appears that very many public English school boards in Ontario have advised the Ministry and/or parents that schools for elementary (and junior high) students will not be open on January 11, 2013, or at least that whether they will be open will not be clear until the morning of January 11, 2013.

Preliminary Objections

(a) Deferral to Court

5. Having heard the submissions of the parties, I declined to defer this to court proceedings, as urged by ETFO, and that I was advised have been initiated by the unions. Leaving aside that those court proceedings would not be heard until September, 2013 at the earliest (and they may be later), Bill 115, to say nothing of the *Education Act* and the *Labour Relations Act*, explicitly envisages an application to the Ontario Labour Relations Board for

violations of Bill 115 including allegations of unlawful strikes, and this Board has often dealt with the question of whether a political protest constitutes an unlawful strike. Although I appreciate ETFO's advice that it has no plans either for another day of protest, or vote to hold another day of protest as required by the ETFO constitution, that is only no plan at the present time, in the hope that the new Premier will revisit Bill 115. I have no way of knowing whether that is an overly optimistic assessment by ETFO or not — in which case the question of whether such a political protest can constitute an illegal strike might arise again well before the court determination. I also appreciate that section 14 denies the Board the jurisdiction to determine whether Bill 115 is constitutionally valid – something ETFO asserts and is litigating in the court case and would put before me if it could. But that is not the question in these proceedings — it is whether the political protest can constitute an illegal strike. For that argument, ETFO intends to argue that its political protest is protected by the Charter – whether Bill 115 itself violates the Charter or is arguably just a bad law. For that argument section 14 of Bill 115 is not material. In these circumstances I was not prepared to defer this application. Further detailed reasons for this decision can be requested by any party.

(b) Lack of Standing by the Minister

6. ETFO argues that the Minister has no standing to bring this Application. There is no dispute that the Minister would not have standing to bring the Application pursuant to section 100 of the *Labour Relations Act* or the *Education Act* (see section 277(4) and (5) of the *Education Act*.

Section 11 of Bill 115 provides:

> 11. The Minister may, if he or she is of the opinion that it would be in the public interest, make a complaint to the Ontario Labour Relations Board alleging a contravention of this Act.

7. What is required for the Minister to have standing is a "contravention of this Act", namely, Bill 115. The Lieutenant Governor has made an order within the meaning of section 9(2) of Bill 115 imposing collective agreements pursuant to section 9.2(i). I am satisfied that "order" within the opening paragraph of a Section 9(2) includes **all orders** under section 9(2) including an order to impose a collective agreement under 9(2)(i). Section 9(4) provides:

> (4) A strike or lock-out in contravention of an order made under paragraph 2 of subsection (2) is deemed to be an unlawful strike or lock-out for the purposes of the *Labour Relations Act, 1995*.

Whether this is a strike or not remains to be determined, but I am satisfied that if it is a strike, section 9(4) deems it to be an illegal strike. ETFO says it is still not "in contravention of an order" I do not see how what is statutorily deemed an illegal strike after an order under section 9(2)(i) imposing a collective agreement cannot amount to a contravention of that order. As well there is no dispute that those collective agreements would have a no-strike or lock out provisions, so I am also persuaded that a strike in contravention of those provisions of the collective agreement that is imposed by the order, is also a contravention of that order imposing the collective agreement.

8. I make this determination without giving the statute either the purposive interpretation, as urged by the Minister, or a strict interpretation as urged by ETFO, but on what I believe to be the clear and simple reading of the words of the statute. Again, further detailed reasons for these decisions can be requested by any party.

Merits of the Application

9. The facts giving rise to this application were not seriously in dispute and the matter proceeded on the particulars pleaded by the Minister (with certain explanations and caveats made by counsel for ETFO). There was no dispute that there is a collective agreement, albeit imposed by Bill 115, in place and that strikes are prohibited during the term of the collective agreement. The particulars also disclose that ETFO and its president have, at the very least, supported and encouraged the holding of an illegal strike against the school boards to be held on January 11, 2013, albeit characterized by ETFO as a "day of protest" or "political action"

10. The Minister points me to the well established jurisprudence of this Board that a "political strike" during the term of a collective agreement (what the parties in some of the cases referred to as a "mid-term strike") is still an unlawful strike under the Act. See *Ontario Hospital Association* [2003] OLRB Rep. July/August 622; *General Motors of Canada Limited* [1996] OLRB Rep May/June 409 and *British Columbia Teachers Federation v. British Columbia Public School Employers' Assn.* [2009] 306 D.L.R (4th) 144.

11. ETFO seeks to distinguish these cases by saying that they involve strikes during freely-negotiated collective agreements or because the Board (or the British Columbia Court of Appeal) could not precisely or effectively determine the parameters of a "political strike. ETFO says neither of those factors are applicable here.

12. I am not persuaded that these are sufficient or salient distinctions. I am not persuaded that ETFO's suggested test for a political strike that would be exempted from the unlawful strike provisions is workable and that it would not undermine the fundamental provisions of the Act that preclude strikes during the course of a collective agreement. Nor am I persuaded that the Charter protection afforded to speech (whether "labour speech" or speech generally) outweighs the disruption that will be wrought on the statutory labour relations scheme by acceding to ETFO's position – in other words that the section 1 defence to the Charter violation is not as applicable in this case as it was in all the previous cases. Accordingly, the day of protest that ETFO has indisputedly authorized and supported for January 11th, 2013 is an unlawful strike under the Act.

13. I heard the parties' submissions with respect to the appropriate remedial relief in these circumstances. In the circumstances, therefore, I make the following orders and declarations:

a) a declaration that ETFO has called or authorized or threatened to call or authorize an unlawful strike contrary to section 81 and 83 of the *Labour Relations Act, 1995*;

b) a declaration that Sam Hammond has supported or encouraged an unlawful strike or threatened an unlawful strike, which he knew or ought to have known, as a probable and reasonable consequence of his action, would cause others to engage in an unlawful strike, contrary to sections 81 and 83 of the *Labour Relations Act*;

c) a declaration that a refusal to work by teachers on January 11, 2013 as part of a concerted effort to disrupt delivery of education to elementary schools in Ontario would constitute an unlawful strike, contrary to section 79 of the *Labour Relations Act;*

d) a direction that ETFO, Sam Hammond and its officers , officials or agents and anyone acting on their behalf cease and desist from authorizing, supporting, encouraging or threatening to call or authorize an unlawful strike;

e) a direction that ETFO forthwith provide notice of these declarations and directions contained in this decision to their members who are employed by school boards in Ontario by all appropriate means;

f) a direction that ETFO or anyone having notice of this direction refrain from engaging in an unlawful strike against the school boards and refrain from any act which they know or ought to know will prompt other persons to engage in an unlawful strike;

g) a direction that a copy of this decision be posted at every ETFO bulletin board in every public elementary school that employs members of ETFO as soon as reasonably possible for the next 30 days.

14. Due to the lateness of the hour (it is now after 3:30 a.m. on January 11, 2013 and this hearing commenced at 3:00 p.m. on January 10, 2013), and the need to immediately release a decision of the Board, the foregoing is only a brief summary and highlights of the reasons for my decision or all of the arguments made to me. More detailed and fuller reasons for this decision will be provided at the written request of any of the parties to these proceedings.

2855-12-OH Wade Barber, Applicant v. **LP Services**, Responding Party.

Health and Safety – Reprisal – The worker refused to drive a replacement truck he was provided because he alleged it was unsafe to transport steel – He testified the steering was loose, the conditions of the mirrors made it difficult to change lanes; there was no engine brake (or Jake brake) and there were exposed wires from the dashboard – The worker advised the company he would not drive the truck as it was unsafe (although he did offer to return the truck to Hamilton, without the trailer attached) and he was terminated on that day – In the face of uncontradicted evidence by the worker the Board found that the worker reasonably believed the truck to be unsafe for the purpose of hauling steel, that he refused to work as a result and that he promptly notified his employer of this refusal – The employer, rather than investigating this refusal, terminated the worker's employment

which termination was motivated, at least in part, by his compliance with the Act – Although reinstatement with full compensation was the presumptive remedy in these situations, this would not be appropriate given the unworkable relationship between the parties – Accordingly the Board ordered compensation from the date of termination to the date of hearing, plus an additional four weeks pay – Application granted

BEFORE: Jesse M. Nyman, Vice-Chair.

APPEARANCES: *Wade Barber* appearing on his own behalf; *Karim Najak* appearing on behalf of LP Services and *Aaron Chusing*

DECISION OF THE BOARD: February 26, 2013

1. In this matter the applicant, Mr. Wade Barber ("Mr. Barber") alleges that the responding party, LP Services ("LP") violated section 50 of the *Occupational Health and Safety Act* R.S.O. 1990, c 0.1 as amended (the "Act") when LP terminated his employment on November 6, 2012. Mr. Barber drove a truck for LP. He alleges that on the morning of November 6, 2012 he called LP and stated he was refusing to drive the truck he had been given because it was unsafe. He claims that LP's general manager, Mr. Aaron Chusing ("Mr. Chusing") terminated him as a result.

2. LP denies it violated the Act or that Mr. Barber's termination was in any way related to the exercise of rights under the Act. It asserts Mr. Barber was a probationary employee and that he was terminated because of problems with his conduct and in particular his profane language when he spoke with Mr. Chusing and LP's dispatcher, Mr. David Yates ("Mr. Yates") on November 6, 2012.

3. The Board finds that Mr. Barber's termination was motivated, at least in part, to the exercise of rights under the Act. The Board orders LP to compensate Mr. Barber as set out in the reasons below. The Board does not order LP to reinstate Mr. Barber. The Board's reasons are as follows.

Responding Party

4. In his Application Mr. Barber named both LP and Mr. Chusing as responding parties. No submissions were made that could establish a basis for Mr. Chusing being a responding party in his personal capacity. The Board hereby removes Mr. Chusing as a personally named responding party and the style of cause is hereby amended to reflect the correct name of the responding party: "LP Services".

Adjournment

5. LP was represented at the hearing by LP's controller, Mr. Karim Najak ("Mr. Najak"). At the commencement of the hearing, Mr. Najak asked that the hearing be adjourned. He based this request on two grounds: 1) that he knew little about the case; and 2) that the person that

knew about the case, Mr. Chusing, was unavailable because of a family emergency. When questioned, Mr. Najak could not identify the nature of the emergency or where Mr. Chusing was. At the hearing, the Board orally denied the request for an adjournment.

6. Adjournments are not granted because parties choose to send representatives who know little about a case. With respect to Mr. Chusing's availability, by decision dated February 8, 2013 the Board denied a request in writing by Mr. Chusing for an adjournment on the basis of an unspecified 'family emergency' In that decision the Board held that "[s]imply stating that the general manager has a family emergency is insufficient to justify an adjournment. There are no details of the nature of the family emergency and how it means the general manager cannot attend." Mr. Najak was unable to provide any further details of the nature of the family emergency, Mr. Chusing's location or explain why Mr. Chusing could not attend as a result. It is insufficient to renew a request for adjournment on identical grounds to those which have been previously dismissed.

The Evidence

7. The matter initially proceeded by way of consultation. Part way through the consultation Mr. Barber took the stand and gave evidence under oath. Mr. Najak was given an opportunity to cross examine Mr. Barber. Mr. Najak was also given an opportunity to present any evidence LP wished the Board to consider. He filed two statements sworn on February 13, 2013; one from Mr. Yates and one from Mr. Terry Hollis, another driver for LP. He also filed an unsworn statement dated February 7, 2013 written by Mr. Brian Culp, one of LP's mechanics. Mr. Najak witnessed the statement and said that he saw Mr. Culp write the statement and sign it. The only reason given why none of these individuals were present at the hearing to give evidence is that LP was a small business and that this was a work day.

8. It is trite that written statements, which are not capable of being subjected to cross examination, are problematic and prejudicial to the party opposite. Moreover, the fact that it is a work day is not a valid reason for failing to call a person to testify. However, the Board has discretion to admit evidence that otherwise would not be admissible in court. In the circumstances the Board exercised its discretion to admit the three statements but advised it would give them little, if any, weight.

9. The Board is an adjudicative tribunal that must reach conclusions of fact and law based upon the evidence and submissions properly put before it. Parties that attend hearings before the Board that are unprepared and that bring no witnesses do so at their own peril. This is particularly so in a case, such as this one, where the Act places the burden of proof on the employer. In *Khaiter v. Labour Relations Board (Ontario)*, 2013 ONSC 791, Lederer J. made the following statement at paragraph 1:

> "Those who come to court are free to act on their own behalf. The right to appear brings with it the responsibility to respect the process of the court and to act within its rules. Coming to court includes the attendant obligation to be familiar with and make some effort to understand that process and those rules.

> A proceeding in court is not a game where the tactics of the individuals taking part can be used to overrun the business at hand."

Those comments are apposite to proceedings before the Board. LP chose to attend the hearing, of which it had ample notice, unprepared and with little evidence and no witnesses. As a result, any concomitant deficiencies in proving its case lie squarely at its feet.

10. Mr. Barber began working for LP on August 14, 2012. He provided a log book showing his first driving day for LP as August 14, 2012. He explained that he had completed his New Hire Information Form approximately a week later and that he must have dated it August 23, 2012 because that was the day he completed the form, not when he actually began work. Mr. Najak did not dispute this evidence.

11. The parties agreed that Mr. Barber was hired to drive a truck for LP and that his work essentially comprised hauling steel in the Niagara region, particularly from US Steel in Nanticoke. On occasion he had runs that took him outside of this area including runs through Woodstock and Hamilton. Mr. Barber was assigned truck number 290. Mr. Barber had no issue fulfilling his driving duties using truck 290.

12. By November 5, 2012 Mr. Barber had driven nearly 20,000 km in truck 290 and had noticed the truck was 'kicking' and 'slipping' in third and seventh gear. He called LP and advised that truck 290 needed to be serviced and he brought it to LP's shop in Hamilton for service at the end of the day on November 5, 2012. Mr. Najak did not dispute this evidence.

13. When Mr. Barber dropped off truck 290, LP provided him with truck 276. Mr. Barber testified that he picked up truck 276 at the end of the day and that he drove it home to Simcoe. On the drive home he noticed the steering was loose and the conditions of the mirrors made it difficult to change lanes. In particular the passenger side mirror was cracked, off angle and vibrated such that he could not see all the way down the trailer and, at times, could not see clearly at all.

14. Mr. Barber testified that he also discovered there was no engine brake (or Jake Brake) on truck 276 and that a portion of the dashboard had been removed and there were a number of exposed wires. He also testified that fuel was leaking out of the caps of both fuel tanks.

15. He testified that while he was able to get the truck home, he thought about it over night and did not believe the truck was fit to safely haul steel the next day. By way of example, he testified it would be unsafe to haul 100,000 pounds of steel down Hamilton Mountain without an engine brake because with that weight standard brakes could suffer 'brake fatigue' and cease to function. Mr. Najak agreed that it would be unsafe not to have a working engine brake in those circumstances. Mr. Barber also testified that the condition and angles of the mirrors made it difficult to reverse or park with a trailer attached.

16. Mr. Barber's evidence was that he reached the conclusion it was dangerous to operate truck 276 to haul steel and that he called Mr. Yates at 5:42 a.m. on November 6, 2012 to advise

that he would not drive truck 276 to haul steel because it was unsafe. Mr. Barber testified that the discussion was short and courteous on both ends. He testified that Mr. Yates said he would have to have Mr. Chusing contact Mr. Barber. Mr. Barber pointed out that there would be no reason for him to be mad at or aggressive towards Mr. Yates during this call. Mr. Barber's cell phone bill, which was entered as an exhibit, showed a call from the cell phone to LP at 5:42 a.m. that was billed as one minute in duration.

17. Mr. Barber testified that Mr. Yates called him back on his land line later that morning to ask if Mr. Barber would haul one load of steel back to Hamilton where he could exchange truck 276 for another one. Mr. Barber said he would not return to Hamilton with a load of steel (or even a trailer) but that he would 'bob tail' the truck (return with no trailer) back to Hamilton and exchange it for a different truck. LP did not take Mr. Barber up on this offer.

18. Mr. Barber testified that shortly after 10 a.m. he received a call from Mr. Chusing. He testified that he told Mr. Chusing the truck was unsafe and explained his concerns regarding the mirrors, engine brake, dashboard and fuel caps and that he was refusing to drive truck 276 specifically because it was unsafe to haul steel. He testified that Mr. Chusing became upset and started swearing, to which Mr. Barber replied that he was hanging up and Mr. Chusing could call him back "when cooler heads prevail". He testified that at that point Mr. Chusing told him he was fired and that he should leave the keys in the truck. Mr. Barber identified an incoming call at 10:06 a.m. on his cell phone as the call from Mr. Chusing. He pointed out that this call was also billed as one minute in duration.

19. Mr. Barber testified that immediately after Mr. Chusing terminated his employment he drove to where the truck was parked and took several photos of the truck. The photos were entered as exhibits. They showed that both mirrors were mismatched and the passenger side mirror was cracked and fastened to the truck with tape. They also showed an exposed dashboard with exposed wires. Mr. Barber testified that one photo of the control panel showed that there was no engine brake on the truck at all. Mr. Najak reviewed the photos and did not disagree that there was no switch for an engine brake on the dash.

20. As noted earlier, Mr. Najak called no witnesses for LP and he advised that he had no first hand knowledge of the facts. He did however file the three statements referred to above. The material portions of Mr. Culp's unsworn statement reads:

> "…Mirror is affixed to truck [*sic*]. Make or model of mirror or means of fastening are not safety related issues.
>
> …Jake brake was disconnected to discourage driver use in and around residential areas. The engine brake is extremely noisy when engaged. They are provided by manufacturers as selling feature as an alternative to use engine compression to slow the trucks to save engine wear if so desired. Many street have sighs [*sic*] prohibiting the use of them. It is not a safety item.

> …Trim panel is missing, This is for appearance only. IT is not safety related. [emphasis in original]
>
> …Discolouration around fuel tank is dirt accumulation. Fuel tank was most likely carelessly overfilled by driver. Overspill attracted dirt and grime."

21. In addition to the difficulty of accepting this unsworn evidence in face of contradictory oral evidence, it is problematic for a number of reasons. First, it conflicts with Mr. Najak's own concession that the lack of an engine brake is problematic and unsafe when the truck is used to haul steel in the Hamilton area. Second, it fails to address Mr. Barber's evidence about how the condition and manner in which the mirrors were attached caused a safety concern; namely that they did not allow Mr. Barber to see the sides of the truck and they could not be adjusted because of the manner of attachment. Nor does it acknowledge that exposed wires in a truck cab are potentially dangerous. In sum, the Board declines to give Mr. Culp's statement any weight.

22. Mr. Najak also relied on the statement of Mr. Yates sworn on February 13, 2013. The material portions of Mr. Yates statement reads:

> "I am a dispatcher at LP Services. On the day Wade Barber was fired, I was working at my desk. I got a phone call from Driver Wade Barber who proceeded to more or less scream at me that he was "f***ing going home" as he was not driving truck /276 as it was "a piece of S*it", even though it was good enough to get him home the night before. I tried to talk to him reasonably, but to no avail due to his continuing cursing and swearing. I gave up trying to find out what the issue with the truck was, as I was not going to continue to be talked to like that. Finally I told him I would get Aaron, (the Manager) to call him.
>
> Aaron then called wade and put him on the speaker phone and asked me to listen in while he tried to get to the bottom of what Wade thought was wrong with the truck. When Aaron asked him what the problem with the truck was, Wade began cursing and swearing at Aaron, Saying "the truck was a piece of s*it". Aaron asked him again what the problem with it was exactly, but was met with more foul language, none of which was related to what he thought was wrong with the truck. He continued yelling and swearing and went on with something about renting him a truck. Aaron then told him he was fired and hung up on him."

23. By providing and relying on this statement, LP put forth that it had a witness, other than Mr. Chusing, who could testify to the contents of the material conversation wherein Mr. Barber was terminated from employment. Whatever the reason Mr. Chusing was not available, there was no legitimate reason provided for not calling Mr. Yates as a witness.

24. Second, the statement, on its face, is problematic. First, Mr. Yates states that Mr. Barber called in and began screaming and swearing at Mr. Yates about truck 276. As Mr. Barber testified, there would be no apparent reason for Mr. Barber to do so. He knew Mr. Yates was not his manager and that Mr. Yates was not responsible for the condition of the truck. Second, Mr.

Yates quotes Mr. Barber as saying he was "f***ing going home" Mr. Barber was at home at 5:42 a.m. when he called and so the quoted statement makes no sense. Finally, given the litany of issues with the truck, the Board finds it is unlikely that Mr. Barber would have refused or been unable to explain any of the safety issues, either in his conversation with Mr. Yates or his subsequent conversation with Mr. Chusing.

25. The statement conflicts with the oral evidence Mr. Barber gave under oath. Given the various problems with Mr. Yates' statement, the Board accepts the evidence of Mr. Barber over the statement of Mr. Yates.

26. Finally, LP relied on a sworn statement of Mr. Terry Hollis. That statement reads:

> "My name is Terry Hollis. I am a driver at LP Services. I have been employed as a driver here for 7 years.
>
> Wade Barber had been assigned a truck I used to drive. I had left my CB Radio in the truck which I had forgotten to take out before wade had taken the truck. I had run into wade at Janco Steel where we were both being loaded (I do not remember the date). I had asked Wade for the CB radio, as it was my personal property. He told me "no". His demeanor was quite aggressive. I decided not to ask him again, not knowing what he would do.
>
> On October 24, 2012 the day of our company Health and safety meeting, all the drivers were together and I decided to take the opportunity to again ask Wade for the CB, again telling him it was my personal property. He said "No, you ain't getting it back". He seemed very agitated and I let the matter go as I did not want any type of physical confrontation, as Wade seemed even more aggressive than the last time I had asked him. I went to Aaron Chusing, and explained to him what happened. Aaron sent a mechanic to take it out of the truck and the mechanic returned it to me."

27. Presumably this evidence was offered to suggest that Mr. Barber was an aggressive, confrontational and problematic employee. It falls well short of the mark. First, there is nothing to explain why Mr. Hollis took Mr. Barber to be 'quite aggressive' or why he feared any sort of reprisal from Mr. Barber. On its face all the statement says is that Mr. Barber said 'no' when Mr. Hollis asked to take the CB radio out of truck 290. It does not attribute any threat or threatening action to Mr. Barber. Moreover, it appears that Mr. Barber said and did nothing after the CB radio was removed; belying the suggestion he was confrontational over the issue. Most importantly, LP did not see fit to take any action in response to Mr. Hollis' apparent concern, such as warning Mr. Barber about his behaviour. In this regard, the statement comes across as a *post facto* attempt by LP to find something that could possibly bolster its asserted defence, as opposed to anything that was really of concern at the time.

28. Mr. Barber testified in response to this statement. Not surprisingly his evidence contradicted Mr. Hollis' statement. Mr. Barber testified that he spoke to Mr. Chusing about the radio and Mr. Chusing said he would buy it from Mr. Hollis. Mr. Barber testified he thought

nothing more of it until Mr. Hollis asked for the radio back and it became apparent LP had not purchased the radio from Mr. Hollis. Mr. Barber then asked Mr. Hollis how much he wanted for the radio and Mr. Hollis responded he would sell it for $150. Mr. Barber thought that was too much and told Mr. Hollis he and the mechanic could remove the radio. Mr. Barber's uncontradicted evidence was that if LP had a concern about his behaviour at any time, that concern was never conveyed to him and that prior to November 6, 2012 he had never received any discipline or warnings from LP.

29. While it is not necessary to fully resolve the conflict in the evidence, the Board prefers the sworn oral evidence of Mr. Barber over the written statement of Mr. Hollis.

The Law

30. Section 50 of the Act reads:

> 50. (1) No employer or person acting on behalf of an employer shall,
>
> (a) dismiss or threaten to dismiss a worker;
>
> ...
>
> because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the Coroners Act.
>
> ...
>
> (3) The Board may inquire into any complaint filed under subsection (2) or referral made under subsection (2.1) and section 96 of the *Labour Relations Act, 1995*, except subsection (5), applies with all necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act.
>
> (4) On an inquiry by the Board into a complaint filed under subsection (2) or a referral made under subsection (2.1), sections 110, 111, 114 and 116 of the *Labour Relations Act, 1995* apply with all necessary modifications.
>
> (4.1) The chair of the Board may make rules under subsection 110 (18) of the *Labour Relations Act, 1995* to expedite proceedings relating to a complaint filed under subsection (2) or a referral made under subsection (2.1).
>
> (4.2) Subsections 110 (19), (20), (21) and (22) of the *Labour Relations Act, 1995* apply, with necessary modifications, to rules made under subsection (4.1).
>
> (5) On an inquiry by the Board into a complaint filed under subsection (2) or a referral made under subsection (2.1), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.
>
> ...

31. Section 43 of the Act allows an employee to refuse to perform work in specific circumstances. Subsections 43(3) and (4) read:

> (3) A worker may refuse to work or do particular work where he or she has reason to believe that,
>
> (a) any equipment, machine, device or thing the worker is to use or operate is likely to endanger himself, herself or another worker;
>
> (b) the physical condition of the workplace or the part thereof in which he or she works or is to work is likely to endanger himself or herself;
>
> (b.1) workplace violence is likely to endanger himself or herself; or
>
> c) any equipment, machine, device or thing he or she is to use or operate or the physical condition of the workplace or the part thereof in which he or she works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself, herself or another worker.
>
> (4) Upon refusing to work or do particular work, the worker shall promptly report the circumstances of the refusal to the worker's employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of one of,
>
> (a) a committee member who represents workers, if any;
>
> (b) a health and safety representative, if any; or
>
> (c) a worker who because of knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them,
>
> who shall be made available and who shall attend without delay.

32. Section 43 of the Act specifically grants an employee the right to refuse to do particular work where there is reason to believe that the machine he or she has been given to operate will endanger himself, herself or another worker. Where an employee has such a belief, that person has an obligation to promptly report the circumstances and the employer has a duty to promptly investigate the report. Section 50 protects an employee making such a report from being terminated as a result and provides a mechanism for adjudicating any such alleged reprisal. In any such dispute, the burden is on the employer to demonstrate that it did not dismiss the employee for exercising rights under the Act.

33. The Board finds that on November 6, 2012 Mr. Barber reasonably believed that truck 276 was unsafe to operate for the purpose of hauling steel and as a result he determined he would refuse to perform this work. The Board further finds that, in accordance with his obligations

under the Act, Mr. Barber promptly notified his employer of the refusal. Mr. Barber's evidence clearly establishes that this was the purpose of his call to Mr. Yates at 5:42 a.m. on November 6, 2012. Moreover the evidence establishes that Mr. Barber had good reason for believing the condition of truck 276 rendered it unsafe to operate for the purpose of hauling steel.

34. The Board further finds that rather than investigate Mr. Barber's work refusal, as LP was required to do under section 43(4) of the Act, Mr. Chusing terminated his employment and that the termination from employment was motivated, at least in part, because of Mr. Barber's work refusal. On the evidence, LP took no steps to investigate Mr. Barber's work refusal; to the contrary, Mr. Chusing's response was to almost immediately terminate his employment. Section 50 of the Act is engaged if any part of the motivation for terminating the employee is related to the exercise of rights under the Act: *Atchison v. Springs Canada Inc.*, 2004 CanLII 15388 (ON LRB).

Remedy

35. Having found a violation of the Act, The Board must determine what the remedy is for the breach. Mr. Najak made succinct submissions on this point. He submitted that if the Board found LP had violated the Act, the Board was to do what it believed was fair and just and what the law provided for.

36. Mr. Barber submitted that if he were to be reinstated, he wanted a number of conditions attached to the reinstatement. These included a contract stipulating a number of things such as the truck he was to drive and how and when he was to receive work assignments. When he was asked what he wanted if the Board found the types of stipulations he was seeking were remedies the Board would not grant, he responded that if he received a settlement (which the Board understood to mean monetary compensation) it had to take into account the fact that he remained out of work and had lost a job he liked.

37. The Board has broad powers to remedy a violation of section 50. Section 50(3) of the Act incorporates section 96 (except section 96(5)) of the *Labour Relations Act, 1995*, S.O. 1995, c. 1 as amended (the "Labour Relations Act"). Section 96(4) of the Labour Relations Act reads:

> (4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, despite the provisions of any collective agreement, any one or more of,

> (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
>
> (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or
>
> (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally.

Thus the Board can order reinstatement or can order compensation instead of reinstatement.

38. The difficulty in this case is that Mr. Barber was employed by LP for only 12 weeks. He has now been terminated from his employment with LP for longer than he was employed. While Mr. Barber was completely justified in bringing this complaint, the litigation has done nothing to improve the relationship, and more fundamentally the trust, between the parties. While the trust and relationship were, at the very least, strained in November 2012, it appeared to the Board that there was little, if any, foundation left by the time of the hearing. This lack of trust was apparent in the list of stipulations Mr. Barber was seeking as part of any order of reinstatement. The Board does not typically make orders in the nature of those sought by Mr. Barber. The Board is extremely reluctant to issue orders as part of an order for reinstatement that effectively amount to determining the manner in which an employer must generally manage its business and employee affairs.

39. It is trite that trust is a cornerstone of the employment relationship. This is even more so in a position such as that occupied by Mr. Barber where he often worked without any direct supervision and without attending at the employer's premises. If Mr. Barber were reinstated he would be sent back to an employment relationship where neither party has any trust. Moreover, unlike reinstatement in a unionized environment, Mr. Barber would not have the protection or support in the workplace of a bargaining agent.

40. Having regard to Mr. Barber's extremely short service, the lack of trust between the parties and in particular Mr. Barber's submissions as to what was required as part of any order of reinstatement which the Board is of the view are not warranted in this case, the Board is of the view that reinstatement is not appropriate in this case. In the Board's view, reinstatement in the circumstances of this case would simply place the parties in an unworkable relationship and Mr. Barber in a position where he would be doomed to fail.

41. In *Ambutrans Inc.*, [2003] OLRD. No. 117 the Board, at paragraph 11, held that reinstatement with full compensation is presumptively the appropriate remedy where an individual's employment is terminated contrary to section 50(1) of the Act, but where

reinstatement is not sought or would be inappropriate, the Board customarily orders compensation for wage loss to the date of the decision. While the Board agrees that the presumptive remedy is reinstatement with back pay, it is not clear that where reinstatement is not appropriate, only back pay ought to be ordered. In particular, neither *Ambutrans*, *supra*, nor the cases cited in that decision deal with a situation where an applicant was seeking reinstatement and the Board concluded reinstatement was not appropriate. They all dealt with situations where the applicants were not seeking reinstatement, often because they had already found new employment.

42. The purpose of any remedy is to compensate the applicant for his or her loss. In this case Mr. Barber remained out of work as of February 15, 2012, the date of the hearing. While there is an onus on an employee to mitigate his or her losses, proof that an employee has failed to mitigate falls on the employer: *Trelford Automobile Limited*, [1991] OLRB Rep. October 1225 at paragraph 13. In this case LP did not establish a failure to mitigate on the part of Mr. Barber. Thus, presumptively, Mr. Barber is entitled to reinstatement with full back pay to the date of his termination from employment.

43. Any reinstatement with back pay compensates an employee by placing him in the position he would have been in but for the breach of the Act in two ways. Firstly, it remedies past losses in the form of an order of back pay and, secondly, it restores the employee's ability to earn a living by reinstating him or her to his or her former position. Thus an order of back pay to the date of the decision alone is only partial compensation for Mr. Barber where the law holds Mr. Barber is presumptively entitled to more.

44. In this case the Board is of the view that Mr. Barber must be compensated not only for his past losses but for the loss, through no fault of his own, of an ability to continue to earn wages by driving a truck for LP. The amount of any such compensation must be circumscribed by the principle that it is only designed to compensate Mr. Barber and not to punish LP. As a result the Board orders LP to compensate Mr. Barber for an additional four weeks pay on the basis that, together with the time Mr. Barber has already been out of work, an additional four weeks would be a reasonable period of time for Mr. Barber to find alternate suitable employment.

Quantum

45. Mr. Barber did not have a fixed rate of pay. At the hearing he estimated his earnings to be between $800 and $1000 per week. Mr. Najak estimated them to be between $700 and $900 per week. Mr. Najak provided no documents to substantiate his estimate. Mr. Barber provided a single pay stub showing pay for a single day (November 5, 2012) being $200. The difference between the two parties is not substantial. The Board finds that Mr. Barber ought to be compensated at a rate of $900 per week for each week of compensation that he is owed.

Disposition

46. The Board hereby orders LP to pay Mr. Barber forthwith the sum of $18,000 calculated as $900 per week for each week from November 6, 2012 (the date of his termination) to February 26, 2013 (the date of this decision) as back pay, plus an additional four weeks at the same rate.

1938-12-R Universal Workers Union, Labourers' International Union of North America, Local 183, Applicant v. **Maystar General Contractors Inc.**, Responding Party.

Bargaining Unit – Certification Construction Industry – Employee – Status – LIUNA applied to certify a bargaining unit of employees in all sectors except ICI – The status of three individuals was at stake: were they covered by a subsisting collective agreement? – Three employees were required short-term on a condominium project – One employee, G, had an on-going employment relationship with Maystar; he worked in ICI immediately prior to and after the week in question – Two other employees were engaged through the hiring hall for the non-ICI work – The latter two were easily and indisputably in the applicant's bargaining unit – As for employee G, the parties' agreement that he continue in his ICI employment for the non-ICI work could not withstand scrutiny – The Board held that practice as between parties to a collective agreement may give rise to contractual issues between them, but it cannot impact on the statutory rights of the applicant – All 3 employees were found to be in the bargaining unit for purposes of the application – Certificate issued

BEFORE: David A. McKee, Vice-Chair.

APPEARANCES: *Mark Wright* appearing for the applicant; *Joseph Liberman* and *Sandra Maio* appearing for the responding party.

DECISION OF THE BOARD: January 11, 2013

1. This is an application for certification brought pursuant to the construction industry provisions of the *Labour Relations Act, 1995*, S. O. 1995 ch.1 as amended (the "Act"), and in particular section 128.1 of the Act. The applicant, Labourers' International Union of North America Local 183 ("the Union") has applied to be certified to represent a bargaining unit of all construction labourers in the employ of the responding party, Maystar General Contractors Inc. ("Maystar") who are employed in all sectors of the construction industry other than the industrial, commercial and institutional sector. The sole issue to be decided is whether or not the three employees in respect of whom this application was made are covered by a subsisting collective agreement. The facts were agreed by the parties as follows:

> (a) Maystar is bound to the Provincial Collective Agreement of the Labourers' International Union of North America, and affiliates ("the Labourers' Provincial Collective Agreement"), but only in the industrial, commercial and institutional sector. It had become bound by virtue of a voluntary recognition agreement.

(b) For a number of years it has employed members of Labourers' International Union of North America, Local 506 ("Local 506") on various ICI jobs in the Toronto area. Maystar's work is primarily in the ICI sector.

(c) In 2012 it entered into a Construction Management agreement at a condominium project at Young Street and Edgar Avenue in the City of Toronto.

(d) It decided to perform some work with its own employees. It instructed Shane Goya, described only as a "regular, long-term employee" of Maystar to report to the condominium job. He was a member of Local 506 and had worked for an unidentified period of time for Maystar. Mr. Goya did so.

(e) Maystar's project manager at the condominium site called Local 506 for two more construction labourers. Shane Goya worked for 40 hours, the other two for 16 and 5 hours each. They were all paid under the terms and conditions of the Provincial Collective Agreement.

(f) When the application was filed, all three employees were at work, they were employed by Maystar, and were performing the work of a construction labourer.

2. Maystar asserts that the three employees were covered by the Labourers' Provincial Collective Agreement. It asserts that this was the collective agreement under which they were hired, paid, and pursuant to which Mr. Goya was sent to another ICI site and the other two were laid off (or quit). The work they were assigned to do on the condominium project was completed in the week they were on site. The Labourers rely on the long-standing principle first articulated in *Ecodyne Limited*, [1979] OLRB Rep. July 629 that the mere observance of the terms of a collective agreement do not create bargaining rights. In their submission, since there are no bargaining rights outside of the ICI sector, the application can proceed.

3. With respect to the two employees who called from the Local 506 hiring hall, I have no trouble finding that they are not covered by the Provincial Collective Agreement. They had no contact with Maystar before or after the job. The fact that they were paid pursuant to the collective agreement does not, in and of itself, mean that they are covered by the collective agreement. This is the exact fact situation of *Ecodyne*, above. The mere application of the terms and conditions of the collective agreement to two employees does not bring them within the scope of that collective agreement when the agreement clearly does not apply to the project on which the work was done. They are in the bargaining unit applied for in this application.

4. The issue is more complicated when examining Shane Goya since he had, at the very least, a subsisting employment relationship with Maystar. He went to the condominium site because, while working as a construction labourer under the Provincial Collective Agreement, he was instructed to do so. He followed that instruction as he was obliged to do. He also returned

to an ICI project after his week at the condominium project. The Provincial Collective Agreement covered his employment on both ICI sites.

5. The question in this case is whether the Labourers' Provincial Collective Agreement covers Mr. Goya's employment. In examining the Board's previous case law, it is important to look at the context in which, and the purpose for which, the question is being asked. A dispute between an employer and a trade union as to whether or not a collective agreement, or certain terms of the collective agreement, apply to an employee is a contractual matter that requires the Board to interpret and apply the collective agreement as a contract between the two parties. This involves an examination of the words of the collective agreement, including any extrinsic evidence if appropriate, and the equities arising from the parties' conduct. When as, in this case, the application is an application for certification, the question is one of statutory rights, particularly of the applicant union, and the equities arising from the conduct between two parties are likely to be of little or no significance. These two contexts are not watertight compartments. A certification application in which a collective agreement is held up as a bar to the application will require an analysis of the words of the collective agreement. There is, however, little or no scope for a consideration of the equities that arise between the parties to the collective agreement that are not reflected in the terms of the collective agreement.

6. Maystar relies on two previous decisions of the Board. In *Electrical Power Systems Contractors' Association,* [1990] OLRB Rep. Oct. 1031, the Board found that construction labourers who were employed under a collective agreement with Ontario Hydro continued to be employed under the collective agreement even though they were assigned the work of salvaging wood from wooden pallets to create new and other structures out of the wood in a nearby pallet yard. That work was not normally work that would be covered by the collective agreement. They had been assigned that work because they had injured themselves while working under the collective agreement on Ontario Hydro property and were called back to perform "light duties" That work was designed to assist them in returning to work under the collective agreement (although many did not) and defrayed of the costs under what is now the WSIB.

7. The Board found that they were covered by the collective agreement. It did so in its role as arbitrator under the collective agreement. The Board did consider that in another context, it might not have found that the work they performed was work that fit the statutory definition of "construction industry" under the Act. However, the Board concluded that this was only one piece of evidence to consider. The Board also looked at the collective agreement and interpreted the scope clause of the collective agreement. The examination required the Board to define the meaning of the term "construction work" as it was used under that collective agreement, having regard to the extrinsic evidence before it. The Board found that, for the purposes of the collective agreement, that clause in the recognition provision was ambiguous and extrinsic evidence assisted the Board in determining that the agreement between the parties did in fact cover persons such as the grievor in that case.

8. That decision was relied on, perhaps overly broadly, by the Board in *Peri Formwork Systems Inc.* [2007] OLRD No. 3990; 2007 CanLII 40713 (ON LRB) (I was the author of the decision). Peri was a scaffolding contractor, or at least operated a very large scaffolding

division. One group of employees worked in its shop and were covered by a shop collective agreement with the Carpenters' Union. Persons referred to as "scaffolders" worked primarily in the field on construction sites and were employed pursuant to the Carpenters' Provincial Collective Agreement. When the scaffolding material was no longer needed on a construction site, the scaffolders returned it to the shop. The scaffolders would on occasion clean and check the component parts they had brought back, would send the defective and broken parts to the shop for repair or disposal, and would stack the parts in a truck or in a warehouse. At all times the scaffolders were paid pursuant the Carpenters' Provincial Collective Agreement.

9. Shop employees working under the shop collective agreement also performed that work from time to time, particularly when the scaffolders were too busy on job sites to do the work in the shop.

10. Another union sought to displace the Carpenters' Union as bargaining agent for the shop employees only. It sought to rely on membership evidence from some of the scaffolders who were working in the shop yard sorting scaffold parts on the application date, even though they were employed and paid under the Provincial Collective Agreement.

11. The Board found that they were not covered by the shop agreement but by the Provincial Collective Agreement. It relied in part on the *EPSCA* decision stating:

> 5. The employees were hired under the Provincial Collective Agreement; the terms and conditions of employment under that agreement govern their employment. When, in the context of that bargaining relationship, an employee is directed to do certain work, and the employee does that work, the nature of the work does not take him or her out of the bargaining unit. If that were the case, an employee could be assigned to do work outside of the scope of the bargaining unit, discharged without cause, and no grievance could be filed because the collective agreement did not apply to him or her on that day. Such a result is absurd. For a similar conclusion see *Electrical Power Systems Contractors Association*, [1990] OLRB Rep. Oct. 1031.

12. To say that the result is "absurd" is overly broad, and likely inappropriate in that context. To apply the analysis of the *EPSCA* decision more closely, the question was whether the collective agreement covered the persons who are employed under it and who were challenged by the employer and the Carpenters' Union as not being employees in the bargaining unit. Although the Carpenters' Provincial Collective Agreement is not quoted in the decision, it is evident that the work of cleaning, sorting, and restocking parts was integrally connected with the erection and dismantling of the scaffolding in the field. It could have been done, and often was at least in part performed on the job site, although it was also performed in the shop. In that case it is not a particularly difficult analysis to conclude that the "erection and dismantling of scaffolding" in the collective agreement included that ancillary work, regardless of where it was performed.

13. Finally, whether they were covered by the Carpenters Provincial Collective Agreement or not, they were clearly not covered by the shop agreement. As the Board said more succinctly in *Van Horne Construction Limited* 2008 CanLII 40936 (ON LRB) at paragraph 24:

> The Board quite rightly decided that it made very little sense to conclude that someone who is performing work in one bargaining unit pursuant to the collective agreement applicable to that unit should migrate to a different unit and a different collective agreement, dependent upon where he or she was performing work on any given date, work that was related to tasks previously performed pursuant to the first collective agreement. As a result, the Board concluded that the first agreement - the Provincial Agreement - applied to the work of those individuals, no matter where the work was performed.

14. In *Van Horne*, the employer was bound to the Carpenters' Provincial Collective Agreement in the ICI sector. Indeed, that collective agreement specifically limits its application to the ICI sector. The employer transferred the three employees to a residential job and applied the terms and conditions of the Carpenters' Provincial Collective Agreement to the carpenters on the site. Shortly after they started, the Carpenters' Union applied for bargaining rights for all employees in the non-ICI sectors in Board Area 8.

15. The employer argued that they were covered by the Carpenters' Provincial Collective agreement and were not employees in the bargaining unit. The employer relied on the fact that it had applied to the Carpenters' Provincial Collective Agreement, that the Carpenters' Union knew what the employer planned to do in advance of moving those employees and that the union (or more precisely the union benefit plan administrator) had accepted benefit contributions for the hours worked on a site. It relied on the following obiter from *Alcan Aluminum Ltd.* [1997] OLRB Rep May/June 305.

> "With respect, the Board's observation and conclusion in *Ecodyne Limited, supra*, is as true today as it was in 1979 – as far as it goes. Sometimes, the effect of an agreement between an employer and a trade union to apply a collective agreement to work or employees, which would otherwise not be covered, by the collective agreement *does* have the effect of extending the trade union's bargaining rights to such work or employees. Whether it does or doesn't do so depends upon the mutual intent of the parties."

16. The Board in *Van Horne*, rejected that argument and conclude at paragraph 20:

> In my view, the legal principle established by *Ecodyne Limited* and reiterated in the Board decisions set out above largely disposes of this proceeding. Even if Van Horne did apply the terms of the Provincial Agreement to the employment of the three individuals on the application filing date, the mere application of the Provincial Agreement in that fashion does not create a collective agreement between Van Horne and the Carpenters that relates to the non-ICI sectors of the construction industry in Board Area No. 8, nor does it bind the employees in question to any such collective agreement. There is no material fact pleaded by Van Horne that if proved could establish the

> existence of a mutual intention to apply the Provincial Agreement to the employees in question. In these circumstances, the position taken by Van Horne is not capable of being established.

17. What the Board is required to interpret in this application is the meaning of Articles 1.03 and 1.04 of the Labourers' Provincial Collective Agreement which provide as follows:

> 1.03 The Employer recognizes each Local Union as specified in the attached Schedule 'A' to be the administrative party of this Collective Agreement for work performed within the geographical area and/or jurisdiction of the Local Unions as defined in Schedule 'B' attached hereto.
>
> 1.04 This Agreement shall also apply to an Employer in all other sectors where the Union or any of its affiliated bargaining agents have bargaining rights in such other sectors for the employees of such Employer, provided that such Employer may become signatory to various Collective Agreements applicable in such other sectors.

18. The term "industrial, commercial and institutional sector of the construction industry" is clearly statutory one. While the words originate in the titles given to bargaining patterns in the late 1960s and early 1970s, their importance in the acquisition of bargaining rights by way of certification, the negotiation of collective agreements and the application of those collective agreements in practice have become increasingly important since the accreditation orders were introduced into the Act in 1971. The statutory definition of sector in general, and the industrial, commercial and institutional sector in particular, has taken on enormous significance in applications for certification, jurisdictional disputes and sector disputes. Hence the statutory definition of sector, and the Board's likely view of sector as applied to any one project, is of major significance to all designated trade unions active in the construction industry. Whatever may once have been the case, there is no scope, in an application for certification, for finding that the term "industrial, commercial and institutional sector" is ambiguous.

19. Maystar did not suggest that there was any ambiguity in its argument. Practice as between the parties to the collective agreement may give rise to issues as between them, but absent specific wording, those equities are limited to adjudication between those two parties and do not vary the meaning of the collective agreement or impact on the statutory rights of the applicant.

20. In *EPSCA*, above, the Board was dealing with the words "work in the construction industry" The term "construction industry" is defined in the Act, and has some significance in applications for certification. However, it is a term that is of less significance in the practical application of some collective agreements, and indeed there are many agreements that do their best to blur the line that is drawn in the Act. And in the end, the employer was Ontario Hydro (as it then was), which was itself a unique employer in the construction industry whose collective agreements (particularly with EPSCA) were important but not modelled on any other. Statutory concerns had only limited significance in its bargaining history.

21. In this context, the Labourers' Provincial Collective Agreement clearly and unambiguously applies to the ICI sector only. No amount of extrinsic evidence can change that meaning, nor did Maystar offer any such evidence. A practice of applying that collective agreement to the employment of particular individuals may give rise to an estoppel between the parties (in a wage claim or any discipline or discharge situation, for example) but it cannot be used to "elucidate an ambiguity" where there is no such ambiguity. One cannot give it a completely different meaning from the words used, for all purposes and for all parties. To the extent that any evidence of a "mutual intent" seeks to create an additional and/or ancillary agreement in addition to the written collective agreement, such an argument must fail because of the definition of a collective agreement in section 1 of the Act: it must be an agreement *in writing*.

22. This case is not particularly different from the facts in *Van Horne*. The only evidence we have about the employee is that he was a regular employee of Maystar and worked under the Provincial Collective Agreement in the weeks before and after the week in which the application was filed. The Labourers' Provincial Collective Agreement, for all its creative ambiguity, covers only the ICI sector. Article 1.04 only applies where the Union has bargaining rights in other sectors. The wording of Articles 1.03 and 1.04 make it clear that the term "industrial, commercial and institutional sector" is used in the sense of its statutory meaning. These Articles refer explicitly to existing bargaining rights which are purely creatures of statue, even if they may be created by agreement. There is no evidence, either of a practice or of a documentary nature that would allow the Board to interpret that language to be anything other than the ICI sector.

23. Hence I conclude that Mr. Goya was not in the bargaining unit covered by the Provincial Collective Agreement on the application date, and he too is in the bargaining unit for the purposes of this application.

24. In the decision of October 11, 2012 the Board found that all construction labourers in the employ of the responding party in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the responding party appropriate for collective bargaining.

25. On the basis of the information provided in the application, including the information and membership evidence filed by the applicant, the information provided under subsection 128.1(3) of the Act, and the agreements reached by the parties, the Board is satisfied that more than 55% of the employees in the bargaining unit were members of the applicant on the date the application was filed.

26. The applicant has asked that it be certified pursuant to section 128.1(13)(a) relying solely on the number of persons in the bargaining unit who are its members. The applicant is

entitled to do so under section 128.1. There is nothing raised in this file by any party that would cause the Board to consider directing a representation vote.

27. The Board has received no objection from any employee within the time set in the Notice to Employees provided to the responding party for posting.

28. The Board is satisfied that it should certify the applicant.

29. Therefore, pursuant to subsection 128.1(13) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of Maystar General Contractors Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

30. The responding party is directed to post copies of this decision immediately in a location or locations where they are most likely to come to the attention of individuals in the bargaining unit. These copies must remain posted for a period of 30 days.

0264-09-G United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Applicant v. Electrical Power Systems Construction Association and **Ontario Power Generation Inc.**, Responding Parties.

0266-09-G United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Applicant v. Aecon Industrial Division of **Aecon Group Inc.**, Responding Party.

Collective Agreement – Construction Industry Grievance – The union filed two grievances challenging Ontario Power Generation's imposition of a lifetime ban on the grievor that prevented him from working at any OPG facility either as an employee or as a contractor – The union also claimed damages on the basis that Aecon directed and encouraged the misconduct that gave rise to the ban – The grievor was a general foreman employed by Aecon, who was engaged as a subcontractor by OPG – The grievor falsified OPG training documents for two employees to indicate they were qualified to work as foremen responsible for crews of pipefitters – As a result, Aecon laid off the grievor and OPG subsequently banned him from working at any of its facilities – Regarding the first issue, the union argued that the provision of the collective agreement applicable to the grievance of OPG's decision required OPG to satisfy the "just cause" standard – The Board disagreed, as "just cause" does not apply to an entity that is not the employer of the grievor – The provision containing the language "unjustified" termination or disciplinary action only required OPG to justify or explain the reasons for its decision and that those

reasons provide a rational foundation for the decision – The Board held that OPG established a rational basis for its decision because the decision was made after considering the relevant facts, the serious nature of the offence and the importance of accurate training documents – The union was unable to prove that the decision was arbitrary, capricious or made in bad faith; Aecon's disciplinary response was irrelevant to OPG's decision, there was no evidence of widespread fraudulent doctoring of training records or evidence that OPG was aware of, and even encouraged, this practice – OPG met its burden under the provision – On the second issue, the union argued that the grievor was pressured by Aecon management to falsify the records – The Board was not persuaded: it accepted that Aecon was pressuring the grievor to secure qualified employees, not directing him to falsify records – The Board rejected the argument that Aecon improperly laid the grievor off, since a construction subcontractor can lay off an employee who has been prevented by the general contractor from working at a project – Grievances dismissed

BEFORE: Harry Freedman, Vice-Chair.

APPEARANCES: *S. B. D. Wahl, T. Snooks* and *S. Marshall* for the applicant; *Patrick Moran, John Wolfe* and *Phil Schofield* for Ontario Power Generation Inc.; *Carl Peterson* for Aecon Industrial Division of Aecon Group Inc.; *Patrick Moran* and *Tova Bab-Dayan* for the Electrical Power Systems Construction Association

DECISION OF THE BOARD: January 31, 2013

1. These two grievance referrals for determination by the Board under section 133 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1 as amended (the "Act") arose principally from the decision made by Ontario Power Generation Inc. ("OPG") to ban Stephen Marshall from working at any of its facilities whether as a direct employee of OPG or as an employee of a contractor or subcontractor that is engaged to work on OPG's premises.

2. Mr. Marshall, a journeyman pipefitter and member of the applicant, was at the times material to these matters employed by Aecon Group Inc. ("Aecon") as a general foreman at the Pickering Nuclear Generating Station ("Pickering NGS"). Pickering NGS is owned and operated by OPG. OPG engaged Aecon under a subcontracting arrangement to perform certain work at Pickering NGS. OPG and Aecon are both bound by the collective agreement between the Electrical Power Systems Construction Association and the applicant (the "EPSCA Agreement").

3. On Saturday January 31, 2009 Mr. Marshall undertook and completed two computer based training ("CBT") modules at Pickering NGS for two other Aecon employees after logging into the OPG training system using their employee numbers. After Mr. Marshall successfully completed those CBT modules, they were submitted as if they had been done by those two employees. With those CBT modules having been successfully completed on their behalf, the OPG training records showed that those two employees had each completed a prescribed computer based training course that would then enable each of them to obtain the requisite

qualification to allow them to be working foremen for Aecon under Mr. Marshall at Pickering NGS.

THE ISSUES

4. There are two distinct but related issues that have been raised by the applicant in these proceedings. The first issue is the propriety of the decision made by OPG to impose a lifetime ban on Mr. Marshall working at any of its facilities.[1] The second issue is a claim for damages against Aecon on the basis that Aecon had directed or encouraged Mr. Marshall to complete the CBT modules for those two employees that resulted in him being banned by OPG.[2]

5. If the Board determines that OPG satisfied its obligations under the EPSCA Agreement in relation to Mr. Marshall, then the Board would next determine whether Aecon had directed or encouraged Mr. Marshall to engage in that conduct, and if so, whether Aecon is liable for the losses incurred by Mr. Marshall as a consequence of the decision made by OPG to impose a lifetime ban on him. The applicant's grievance against Aecon also challenged the layoff of Mr. Marshall.

BACKGROUND

6. While the actual event giving rise to the decision made by OPG to bar Mr. Marshall from working at any of its facilities, whether as its employee or as an employee of a subcontractor, was undisputed, the circumstances that existed around the time Mr. Marshall completed the CBT modules for those two other Aecon employees were.

7. Mr. Marshall admitted to having completed CBT modules on behalf of two other Aecon employees who were working at Pickering NGS and submitting those CBT modules for the purpose of establishing that those two individuals had carried out the required training and could therefore become qualified to act as working foremen responsible for crews of journeymen pipefitters who were to carry out Aecon's work at Pickering NGS for which Mr. Marshall, as a general foreman, was responsible.

8. In essence, the applicant's position is that Aecon had directed, or at the very least encouraged Mr. Marshall to ensure by any means necessary that he had enough journeymen pipefitters secure the requisite qualifications to act as working foremen for Aecon's pipefitter crews who were to perform the work Aecon obtained from OPG at Pickering NGS. According to the applicant, Aecon's direction or encouragement that Mr. Marshall use any means necessary to have working foremen qualified to supervise pipefitter crews who were to do Aecon's work at Pickering NGS included having Mr. Marshall undertake CBT modules for those tradesmen.

- [1] The Board in its March 31, 2010 decision [2010] OLRB Rep. Mar./Apr. 298 determined that "OPG must establish its decision to bar Mr. Marshall from its sites meets the standard established by section 35.7 of the EPSCA Agreement."

- [2] See the Board's May 31, 2012 decision 2012 CanLII 29608 (ON LRB)

9. OPG as the operator of a nuclear generating facility licensed under the *Nuclear Safety and Control Act*, S.C. 1997, c. 9 (the "NSCA") has the ultimate responsibility for ensuring that only tradespeople who perform work at Pickering NGS and their supervisors and managers hold the requisite qualifications to perform the work they have been assigned. The individuals who work at Pickering NGS, whether employees of OPG or of a subcontractor engaged by OPG can obtain the requisite qualifications through training, which can take different forms, including computer assisted learning that involve individuals undertaking and successfully completing specific CBT modules. Some qualifications can be obtained by individuals taking and passing specific CBT modules.

10. OPG maintains records of the training people who work at its facilities have received in order to ensure that the tradespeople responsible for carrying out, monitoring, directing or supervising the construction and maintenance work at its nuclear powered electrical generating facilities are properly trained and qualified to carry out the work they are assigned to perform. The Training Information Management System ("TIMS") maintained by OPG tracks who has taken and passed the required CBT modules as a way of ensuring that only qualified individuals, whether its employees or the employees of subcontractors, carry out the work at those facilities. The training records and the qualifications held by the tradespeople, including their supervisors and first line managers who work at Pickering NGS are subject to audit by the Canadian Nuclear Safety Commission (the "CNSC").

11. TIMS is one of many OPG internal web or intranet systems that can be accessed by not only OPG personnel, but also by OPG subcontractors such as Aecon and their employees. In order to take and complete a CBT module at Pickering NGS, an individual must use a computer terminal that has access to the OPG internal web based or intranet system. Aecon's premises at Pickering NGS had computer terminals that were connected to the OPG intranet system. Aecon employees who wanted to complete a CBT module could log on to the OPG intranet system using one of the computer terminals in the Aecon Pickering NGS office by using their individual employee number and then going to the specific CBT module they wanted to complete.

12. There are a variety of CBT modules that must be completed by individuals in order to be qualified to carry out work. Phil Schofield, position manager, construction support in the OPG contract management office ("CMO") at Pickering NGS explained that the training or qualifications required for building trades personnel is spelled out in a training qualification document that varies depending on an individual's role. There are basic training CBT modules, basic supervisory training CBT modules and specific job related training CBT modules for particular assignments.

13. The OPG CMO at Pickering NGS is responsible for managing and monitoring the OPG subcontractors at Pickering NGS to ensure they carry out their work in accordance with the terms and conditions of their contract with OPG and in compliance with OPG policies and regulations. One of the responsibilities of the CMO that is shared with the OPG subcontractors is ensuring that the subcontractors' employees are up to date with their qualifications, including successful completion of the required CBT modules.

14. The Pickering NGS CMO has two section managers each of whom have contract administrators who report to them. The two section managers reported to Robin Granger, the Pickering NGS CMO Manager. Mr. Schofield was one of the two section managers. The section managers assign certain projects to the contract administrators. Patrick McAnulty was a contract administrator who reported to Mr. Schofield.

15. The successful completion of a particular CBT module by an individual is recorded in TIMS. At the same time TIMS automatically generates an e-mail notification that is sent to the training "sponsor" of that employee. Mr. McAnulty was the designated training sponsor for all Aecon personnel. That e-mail notification identifies the individual who had logged in to take the CBT module, the date and time the CBT module was done, the length of time taken for completing it, the grade and the result. TIMS records the date a particular individual successfully completed a requisite training module.

16. Mr. McAnulty was at work in the CMO on Saturday January 31st when he was notified by a TIMS e-mail that two individuals had each successfully completed CBT modules. He noticed that those two individuals were not scheduled to be at work on that day nor had the daily attendance report submitted to the CMO indicated they had come into work. As a result, Mr. McAnulty contacted Mr. Schofield about the discrepancy. Mr. Schofield and the other section manager at the Pickering NGS CMO contacted Jeff Gagne, the senior Aecon official at Pickering NGS and met with him on Monday morning February 2nd They relayed their concern about the discrepancy and asked him to investigate what had occurred

17. On that morning, Mr. Marshall was contacted by Tom Norris, an Aecon work co-ordinator to whom Mr. Marshall reported to discuss what had occurred. Mr. Marshall advised Mr. Norris that he had done the CBT modules for two other people and in a later conversation with Kevin Milton, Aecon's project superintendent, also acknowledged having done those two CBT modules. Later that same day, Jeff Gagné, Aecon's nuclear account manager responsible for managing its relationship with OPG issued a memorandum that stated:

> It has been identified that an Aecon Industrial supervisor completed a CBT CAL on behalf of another worker. It is mandatory that workers/supervisors complete their own CBT's. CBT's provide workers/supervisors with the basic knowledge to perform tasks safely. **Safety is Aecon's number one concern for any project, for this reason any further incidents of this kind will result in the dismissal of the parties involved.**

That memorandum was "rolled out" to Aecon employees at meetings the next day where the issue was discussed.

18. Later that week, Mr. Milton provided the Pickering NGS CMO with a copy of the February 2nd memorandum issued by Mr. Gagné. The matter of a supervisor completing CBT modules for other employees was also the subject of a Station Condition Record ("SCR") file[3]

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[3] An SCR is created by OPG to document any condition, incident or event, whether a mechanical or equipment issue or human problem, that may have an impact on the operation of the generating station.

that was opened by OPG on February 5, 2012. The "event title" for that SCR was recorded as "Supervisor found completing a CBT for two workers". The relevant portion of that initial SCR stated:

> **Description of Condition:**
>
> Contractor was questioned about two employee's completion of a CBT when the employee's [sic] were not on site. Contractor management questioned employee's supervisor about the situation and the supervisor admitted to completing the CBT on behalf of the employee's, and stated that this was a one time only occurrence.
>
> When questioned about his actions taken the supervisor admitted to feeling pressured to get the employee's qualified as supervisors as qualified personal are in short supply and he had a large amount of work that had to be completed at the time and seeing that the employee's have been supervisors on site for other contractors in the past he did not realize the serious nature of his actions.
>
> **Immediate Action Taken:**
>
> Talked to the supervisor and explained the serious nature of the situation. Supervisor accepted coaching with a professional attitude and at this time felt remorse and realized how serious his actions were. Supervisor has been removed from role and placed back on the tools. Contractor management has issued a memorandum stating that any further incidents of this nature will result in the dismissal of the parties involved and will be read out to all crews with a sign back sheet.

The matter of a supervisor completing CBT modules for workers was also the subject of a Plan of the Day Meeting at Pickering NGS that is attended by station management staff. Those daily meetings take place first thing in the morning to review any issues relating to work that is to take place that day. Mr. Milton presented the information about what had occurred with respect to one of its supervisors completing CBT modules for other employees to that meeting.

19. Any incident that is the subject of an SCR is subject to a review and follow up by OPG. OPG develops and implements a corrective action plan after an SCR is initially created to address the event recorded in the SCR in order to avoid any repetition of a similar incident. The corrective action plan and the steps taken to implement that plan are recorded in the SCR and are reviewed by an OPG management committee.

20. Each SCR is also reviewed by the regulatory affairs office of OPG. One of the elements addressed in the review by that office is whether the incident set out in the SCR must be reported to the CNSC.

21. Mark Arnone, the OPG vice president responsible for nuclear refurbishment and who at the time of the incident was the director of projects and modifications, explained that OPG is

obliged to report any incident that may have an impact on its operating licence to the CNSC. He testified that the failure to immediately notify the CNSC of any reportable incident as soon as OPG determines the incident is one that ought to be reported is itself a serious violation of its licence to operate a nuclear generating facility.

22. Mr. Arnone, when he was the director of projects and modifications was responsible for the Pickering NGS CMO and Mr. Granger reported to him. Mr. Arnone learned about the incident involving Mr. Marshall completing CBT modules for two employees from Mr. Granger. When he learned what had occurred, Mr. Arnone contacted Aecon to express his concerns about the incident and to find out what steps it was taking to deal with the matter. He also directed Mr. Granger to keep him informed about what developments were taking place in respect of the incident.

23. The OPG regulatory affairs office determined that a supervisor performing CBT modules for other employees amounted to a falsification of documentation. Document falsification relating to the operation of a nuclear facility is, according to Mr. Arnone, a very serious issue for both OPG and the CNSC. It was classified by the regulatory affairs office as a reportable incident and therefore it was reported to the CNSC.

24. Any incident that must be reported to the CNSC is also immediately brought to the attention of OPG senior management, including its chief nuclear officer and the senior staff who report to him. Mr. Arnone explained their immediate focus was dealing with the impact of the incident on their operating licence, what action OPG would take to remedy the situation, whether there were any other examples of document falsification relating to training, and to ensure that this type of training document falsification would not recur.

25. After Mr. Marshall's conduct was discovered and acknowledged, Aecon had apprised OPG of what had occurred and what steps it was taking address the situation. The information contained in the SCR prepared by OPG relating to the incident was based on the information it had received from Aecon. OPG did not conduct an independent investigation of the incident or the circumstances that led to it occurring. OPG relied on the information Aecon had provided when recommendations were made and decisions taken in respect of the incident.

26. Aecon advised Mr. Marshall later that week that he would lose his qualifications and would no longer hold the position of general foreman although he was asked to continue to provide information about the work for which he had been responsible to Mr. Norris who had been assigned by Aecon to replace Mr. Marshall as a general foreman. As of the end of that week, Aecon had advised Mr. Marshall that as a result of having completed CBT modules for two other employees, he was demoted, stripped of his qualifications and was suspended for one week.

27. The applicant did not dispute the disciplinary penalties Aecon imposed on Mr. Marshall.

OPG DECISION

28. OPG determined based on a recommendation made by Mr. Arnone after receiving and considering the information provided by Aecon about what had occurred, that Mr. Marshall would no longer be permitted to work at any of its facilities. Mr. Arnone, in a letter dated March 11, 2009 advised the applicant Mr. Marshall would no longer be permitted to attend at any of its facilities. That letter addressed to the applicant stated:

> Following the layoff of Mr. Steve D. Marshall by Aecon, OPG reviewed the impact of his performance on the operation of our Nuclear Plant. Please be advised that Mr. Steve D. Marshall will not be permitted on any Ontario Power Generation (OPG) site as a result of his inappropriate conduct on January 31, 2009 in his violation of the Nuclear Safety and Control (NSC) Act Section 48 (i). For clarity, this includes not only working for OPG, but also for any contractor on an OPG site. We ask for your co-operation in refraining from referring Mr. Marshall for employment to any OPG site.
>
> Please communicate this to Mr. Marshall.

Section 48(i) of the NSCA provides:

> Every person commits an offence who
>
> ...
>
> (i) falsifies a record kept pursuant to this Act or the regulations or to a condition of a licence;

Mr. Arnone explained that the training records of people who perform work at its nuclear facilities must be maintained by OPG to ensure that only those individuals who have been properly trained and qualified will do work at those facilities pursuant to section 2.9 of its operating licence. Any falsification of those records must be reported to the CNSC.

29. Mr. Arnone testified that he was responsible for recommending to the OPG senior executive group what action OPG should take as a result of the falsification of the training records. Before making his recommendation, he needed to ensure the facts as he understood them were accurate and whether other similar incidents had taken place. Mr. Arnone learned that there had been two situations where the training documentation was not accurate but those arose out of inadvertent errors rather than a deliberate falsification of the training records. Those two situations did not involve Aecon. He also had the training department determine what steps it would take to ensure that a similar incident would not happen again.

30. Ultimately, Mr. Arnone recommended to the senior executive group that Mr. Marshall be barred from OPG nuclear facilities based on his assessment that Mr. Marshall's decision to perform CBT modules for two other workers was a deliberate falsification of their training and qualification records, the impact of that falsification on the integrity of its training records, the

serious nature of the incident and the impact it had on its licence and the reputation of OPG. At the meeting with the senior executive group, questions were raised about why Mr. Marshall was being banned from only the OPG nuclear facilities. Given the nature of the offence and its impact on OPG, the senior executive group determined that Mr. Marshall should not be permitted to work at any of its facilities and did not limit the scope of the ban to just its nuclear operations. Mr. Arnone said in his testimony before the Board that he had supported that decision.

31. Mr. Arnone candidly acknowledged during an extensive and vigorous cross-examination by the applicant that neither he nor any other member of the OPG senior management group that ultimately decided that Mr. Marshall would be banned from all of its facilities had interviewed Mr. Marshall. He also agreed that he did not know whether anyone who was conducting the investigation of the incident on behalf of OPG had interviewed Mr. Marshall to find out his side of the story. Mr. Arnone agreed that if an OPG employee had been involved in an incident that had caused the same kind of concerns that arose from the incident involving Mr. Marshall, a proper investigation of the incident would invariably involve OPG meeting with its employee as part of a thorough fact finding process.

32. Mr. Arnone pointed out that Mr. Marshall was not an employee of OPG and therefore it was not up to OPG to meet with another employer's employee as part of its investigation. Mr. Arnone understood that Aecon was managing the situation. OPG dealt with Aecon management and supervision in carrying out its investigation and in ultimately determining what the appropriate response by OPG would be.

THE ROLE OF AECON

33. There was no dispute that in January 2009 Aecon was in a very difficult situation with respect to having the necessary supervision available to carry out the work it had secured from OPG during an "outage condition". An outage condition occurs when a nuclear reactor is shut down for a period of time for scheduled maintenance and repair work to be performed. At about that time in early 2009, both Aecon's site superintendent (Fred Cox) and a piping general foreman (Mike Newby) had left. As a result, two working foremen were promoted to fill the positions that had been vacated by Messrs. Cox and Newby, one of whom was Mr. Marshall. He was appointed to a general foreman position. The promotion of two working foremen to those positions meant that Aecon needed to have two other journeymen qualified as working foremen in order to supervise two crews of pipefitters during the outage condition. As a result of the outage condition work that was to be carried out, Aecon determined it was necessary to have work carried out on both a day shift and an afternoon shift, so a third working foreman was required for that afternoon shift. One of the remaining working foremen was assigned to the afternoon shift which left Mr. Marshall to fill two working foremen positions for the day shift.

34. Mr. Marshall knew that he was not permitted simply assign two journeymen to the working foremen positions until they had secured the necessary qualifications for those positions by taking and passing certain specific CBT modules.

35. Mr. Marshall explained that not only did he need to have working foremen qualified by taking and passing CBT modules, he had been told that he too was required to take a particular CBT module. He was faced with having to get an urgent job prepared for a crew at the same time as having to get qualified. He testified that when he explained his dilemma to his supervisors, Messrs. Milton and Norris, he was told it would be looked after. Mr. Marshall claimed that someone else had done a CBT module for him on January 27, 2009 as he said he had not done it. In cross-examination, when provided with the TIMS records, he acknowledged he had been mistaken about that and said it had been done later, but that he had not done it.

36. Mr. Marshall also acknowledged that up until January 27, 2009 when he claimed that someone else had done a CBT module for him, he had never been asked to do a CBT module for anyone else and no one had ever done a CBT module for him. Mr. Marshall asserted that Mr. Norris had been aware of his difficulties in getting himself qualified and in getting the work ready for his crews within the time he had available. Mr. Marshall said that Mr. Norris assured him he would help him out as best he could and that he would speak to Mr. Milton.

37. Mr. Marshall also testified that in his conversation with Mr. Milton about having the time to do his CBT modules and getting the necessary work done for a particular project, Mr. Milton had told him he had to do both. Mr. Marshall said that he understood getting the work ready for the project was the priority and that he had understood Mr. Milton would look after having his CBT module done. Mr. Marshall was adamant that he had not done that particular CBT module and that someone else at Aecon had done it for him to get him qualified to continue working as a general foreman.

38. He testified that he recalled being at a gathering in the Aecon offices at Pickering NGS when several Aecon management personnel were present, including Mr. Milton, who were celebrating that everyone had received their qualifications. Mr. Marshall testified that Mr. Milton had told him that he, Mr. Milton, had arranged for someone at Aecon to do his CBT module for him.

39. Mr. Milton in his testimony denied having had a conversation with Mr. Marshall in which he told Mr. Marshall someone had done a CBT module for him, denied arranging for anyone to do a CBT module for Mr. Marshall or for any other person and also denied there being a gathering in the Aecon offices to celebrate everyone having received their qualifications.

40. Mr. Marshall also explained that when he had done the CBT modules on Saturday, he had sent the results to Mr. Norris and Mr. Milton. He could not explain why there was no e-mail record of him sending anything to Mr. Milton on that day. Mr. Milton had denied receiving anything from Mr. Marshall on that Saturday.

41. Mr. Marshall in cross-examination by OPG acknowledged that he understood that OPG regarded the training requirements as very serious matters, and that OPG would not permit anyone who had not received the proper training or who did not hold the requisite qualifications would not be permitted to carry out work at Pickering NGS. He also acknowledged that OPG had made it clear to Aecon that everyone had to be qualified for the jobs they were assigned to

carry out before they could do that work. Mr. Marshall also conceded that he knew doing CBT modules for two other people so that TIMS would show they were qualified to do the work when they had not taken the training and were not qualified was a serious matter and that doing those two CBT modules for others undermined the OPG training and record systems it maintains to ensure that only qualified and trained personnel work in its nuclear facilities.

42. Mr. Marshall explained that he had performed those CBT modules for those two other employees after speaking with Mr. Milton because he had understood from Mr. Milton that he had to do what ever was necessary to get qualified working foremen for his crews. He understood that OPG would not give Aecon any leeway in having foremen who were not qualified supervising the crews working in its nuclear facilities. In his conversations with Mr. Milton about getting the foremen qualified, Mr. Milton told him that if Aecon did not get the necessary foremen qualified before that work had to get done, OPG would get another contractor to do it.

43. Mr. Marshall in his examination in chief said that Mr. Milton had told him that he could help himself by doing his own CBT module and the ones for others on the Saturday because it's quieter on that day. Mr. Marshall also acknowledged that he did not ask Mr. Milton whether he could bring in foremen to work overtime on Saturday for the purpose of having them do their CBT modules. At the conclusion of those conversations with Mr. Milton, Mr. Marshall believed that Mr. Milton had approved of him doing the necessary CBT modules for himself and those two other employees on that Saturday.

44. Mr. Marshall in his cross examination acknowledged that when he had said he understood from Mr. Milton that he could use the Saturday to do his CBT module and the two others and that is what he had done, he was mistaken. He was shown the TIMS record which indicated that he in fact had done his own CBT module on the Friday and not the Saturday. He conceded that he did not do his own CBT module on that Saturday, but did only those CBT modules for the other two individuals.

45. Mr. Marshall was initially adamant that Mr. Milton had made it clear to him that he, Mr. Marshall, had to do whatever was necessary to get his foremen qualified and he took that to mean that he should do the CBT modules for those foremen. Mr. Marshall also agreed that Mr. Milton had told him to let him, Mr. Milton, know if he could not get the two foremen qualified by having them do their necessary CBT modules in time. Mr. Marshall was under tremendous pressure from Mr. Milton to get the work ready for the project and to get his foremen qualified. He was told by Mr. Milton that Aecon cannot or must not fail on this project. Mr. Marshall said in his cross-examination that he believed the message he was getting from Mr. Milton what that he should do the CBT modules for those other two foremen, but he ultimately conceded that Mr. Milton had never told or instructed him that he was to do the CBT modules for those other two individuals.

46. Mr. Milton in his testimony expressly denied having told Mr. Marshall to undertake CBT modules for other employees. He explained that he had made it clear to Mr. Marshall that as a general foreman he was responsible for ensuring that the crews under his supervision and

control had to be qualified. Mr. Milton said it was up to Mr. Marshall to determine how to prioritize his work and ensure that the work that had to be done was done within the time allotted. Mr. Milton was a project superintendent responsible for a number of projects and he explained that it was not up to him to "micro-manage" the general foremen who reported to him.

47. Mr. Milton acknowledged telling Mr. Marshall that Aecon must succeed in getting the work done and also agreed he told Mr. Marshall that if he could not get his foremen qualified to get back to him. He said Mr. Marshall did not get back to him. Mr. Milton also agreed that he had told Mr. Marshall that he could use the Saturday to do the CBT modules he needed to do because it was quiet at that time. He also agreed that he did not provide Mr. Marshall with any suggestions about how Mr. Marshall might schedule and assign the work that needed to be done. He explained he did not make such suggestions to Mr. Marshall because prioritizing, scheduling and assigning work is what a general foreman gets paid to do. Mr. Milton was adamant that he never suggested or even insinuated that Mr. Marshall ought to do the CBT modules for other employees to get them qualified.

48. Mr. Milton explained that OPG releases to Aecon what work has to be carried out and that once that release is done, the work co-ordinator, which was Mr. Norris at the relevant times, provides the general foremen with the necessary information about that work. Mr. Milton also testified in cross-examination that when he told Mr. Marshall that Aecon must succeed, he was making it clear to Mr. Marshall that it was up to Mr. Marshall to ensure he had qualified crews to perform the work, and that if Mr. Marshall did not have a qualified working foreman available, he had to decide whether he would do double duty as a working foreman supervising a crew and his work as a general foreman.

49. Mr. Milton conceded that he had had a number of conversations with Mr. Marshall about the work that had to be done and while he had no specific recollection of some of the conversations Mr. Marshall recalled having with him, he agreed that he had had many conversations with Mr. Marshall about the lack of qualified supervision. Mr. Milton did specifically deny having told Mr. Marshall that he would arrange for others to do the CBT modules for Mr. Marshall and other employees.

50. OPG through the CMO had made it clear to Aecon and Mr. Milton understood that it was up to Aecon to ensure that qualified supervision was available to carry out the work that was being released. Mr. Milton, in turn, was putting pressure on his general foremen to ensure that they carried out the work that Aecon had obtained from OPG. Mr. Milton did, in cross-examination, point out that it was only Mr. Marshall that seemed to be having a problem in organizing the work, establishing priorities, and getting his working foremen qualified. The other general foremen under Mr. Milton' supervision had not advised him that they were having the difficulties that Mr. Marshall appeared to be having.

51. Mr. Marshall had testified that he did not have a qualified foreman available to supervise a crew on the day shift on the Saturday he had carried out the CBT modules for those other two employees. Mr. Marshall explained that Mr. Norris was at work on that Saturday and that Mr. Norris prepared the time sheet that contained the information about who was at work on

the day shift based on the information that Mr. Marshall provided to Mr. Norris. Mr. Marshall was insistent that Steve Martin, a working foreman who had been working nights had been scheduled to work the night shift and was not available to work the Saturday day shift. Mr. Marshall was certain that Mr. Martin did not work on the day shift on that Saturday.

52. During his cross-examination, Mr. Marshall was shown the time sheet that had been provided by Aecon to OPG for that Saturday. It showed Mr. Martin having been at work on the day shift on that day. Mr. Marshall said that can't be the case as he was certain Mr. Martin was not there. Mr. Marshall agreed that he provided the information to Mr. Norris that was used by Mr. Norris to prepare those time sheets, and that those time sheets were prepared shortly after the commencement of the day shift. He agreed he had not been at work on the night shift and would not know whether Mr. Martin had been at work. He also acknowledged that there was a separate time sheet prepared for each shift, and that Aecon was required to record who was at work on each shift and provide that information to OPG.

53. Mr. Marshall when confronted with that discrepancy maintained that Mr. Martin, who was a qualified working foreman, had not been at work on the day shift. He suggested that Mr. Norris might have made some special arrangement with OPG to record Mr. Martin as having been in during the day shift when he in fact was going to be in that night. He conceded that he had no information about such an arrangement and agreed that it was important for both OPG and Aecon to know exactly who was working in its nuclear facility at any time.

54. There is no doubt that Mr. Milton was putting a great deal of pressure on Mr. Marshall to get his work done and to get his supervisors qualified by having their necessary CBT modules completed. And there is also no doubt Mr. Milton did not provide Mr. Marshall with any suggestions about how he might succeed in doing that, taking the view that Mr. Marshall, as a general foreman was the person responsible for determining his priorities, scheduling the work that had to be done and scheduling the people who worked for him to do what was required to get that work done. In particular, Mr. Milton agreed that he had never suggested to Mr. Marshall that he take the working foremen away from their direct supervisory work "in the field" and have those working foremen come in to do the required CBT modules, nor did he suggest that Mr. Marshall schedule them to come into work on the Saturday to do those CBT modules.

55. I am satisfied on the evidence that Mr. Marshall sincerely believed that in order to get his foremen qualified it was necessary to have the TIMS records show they had taken and passed the CBT modules. He also believed that as far as Aecon was concerned based on his understanding of the conversations he had had with Mr. Norris and Mr. Milton that it was very important to show OPG that its foremen were qualified to carry out the work Aecon had received from OPG. He interpreted those conversations, and in particular his conversations with Mr. Milton as providing implicit approval for him to do the CBT modules for those individuals so that the records would show they had been qualified for that work.

PROPRIETY OF THE OPG DECISION

56. As noted in footnote 1 at paragraph 4 above, the Board in its March 31, 2010 decision in this proceeding held that the issue with respect to the decision by OPG to ban Mr. Marshall from its facilities is whether that decision "meets the standard established by section 35.7 of the EPSCA Agreement." Section 35.7 of the EPSCA Agreement provides:

> Alleged unjustified termination, discharge, suspension or disciplinary action may be grieved beginning at First Step.

The applicant submitted that section 35.7 required OPG to meet a "just cause" standard in order to sustain the decision it made in respect of Mr. Marshall. OPG contended it need only provide a reasonable justification for its decision or, in other words, establish that it had a *bona fide* basis for its decision that was not capricious or arbitrary.

57. The applicant argued that section 36.2 of the EPSCA Agreement makes clear that when a grievance alleging "unjustified termination" or "unjustified disciplinary action" comes before an arbitration board for determination that board must determine the matter on the basis of "just cause" and in the course of doing so may substitute such other penalty as is appropriate. Section 36.2 of the EPSCA Agreement provides in part:

> The arbitration board shall not substitute its discretion for that of the parties except where the board determines that an employee has been discharged or otherwise disciplined for cause....In such cases, the arbitration board may substitute such other penalty for the discharge or discipline as to the arbitration board seems just and reasonable in the circumstances.

The applicant submitted that in this case, OPG effectively discharged Mr. Marshall when it banned him from its sites. Since this arbitration is dealing with whether OPG met its obligation under section 35.7 of the EPSCA Agreement, this matter is proceeding under section 36 and therefore, according to the applicant, the remedial jurisdiction in section 36.2 applies.

58. The applicant relies on the analysis undertaken by the Board in *Ontario Power Generation Inc. and Aecon Industrial*, 2011 CanLII 6687 (ON LRB) to support its position that the Board had assessed the merits of a grievance involving the application of section 35.7 using a just cause standard. The applicant referred to the detailed analysis of the events that gave rise to a site ban imposed by OPG in that case on two individuals and argued that although not explicit, the Board in fact had applied the kind of analysis that is used in determining whether OPG had just cause for its decision.

59. A close reading of the Board's decision in *Ontario Power Generation Inc. and Aecon Industrial* suggests to me the Board in that case, as it made clear at paragraph 7, was determining whether OPG had met the standard established by section 35.7. The Board earlier in that paragraph noted that OPG was prepared to proceed on the basis that it was required to establish that its decision met the standard imposed by section 35.7 and then stated: "OPG does not agree that the standard required by section 35.7 is the same as 'just cause.'" The Board did not in that

decision equate "just cause" with the section 35.7 standard, nor did it attempt to define with any degree of precision what the standard established by 35.7 meant.

60. Contrary to the submissions of the applicant, I am of the view that the Board in that case was determining in each of the three grievances before it whether OPG had demonstrated the requisite justification for its decisions. In one of the grievances dealing with OPG having pulled a grievor's qualifications, the Board determined on the evidence that OPG had failed to establish the grounds on which it relied for making its decision. As a result, the Board concluded that OPG had failed to establish it met the standard imposed by section 35.7. In respect of the other two grievances, the Board provided a detailed review of the evidence, and following its review of that evidence determined OPG had met the standard set out in that section of the EPSCA Agreement.

61. The applicant contended that the Board's analysis of that evidence at paragraph 116 of the *Ontario Power Generation Inc. and Aecon Industrial* decision, while not explicit, clearly demonstrated that the Board in that case was assessing the matter through the "just cause" lens. The Board wrote at paragraphs 115-117:

> 115. I turn then to the *question of whether OPG's decision to ban both Messrs. Maitland and Griffith from its job sites was justified.*
>
> 116. As indicated above, having regard to the quantum of discipline imposed by OPG on others involved in this incident, Mr. Maitland's failure to do a proper walk about and failure to properly check the permitry would not attract an overly severe disciplinary sanction. Had the matter ended there, something between the letter of expectations given to Mr. Thuit and the one week suspension given to Mr. Lugtu would likely have been appropriate. Mr. Griffith did nothing improper in connection with the establishing of test conditions and thus none of the reason for imposing the site ban on Mr. Griffith is attributable to the circumstances giving rise to the event. *The issue is thus whether the fact that Messrs. Griffith and Maitland tried to cover up the incident justifies them being banned from all OPG sites.*
>
> 117. OPG operates nuclear facilities. Safety is a very serious concern. Detailed protocols and procedures exist to create a safe work environment. The positions held by Messrs. Maitland and Griffith were positions that existed solely to support a safe work environment. They held no line responsibilities.
>
> 118. There is a difference between committing a mistake and attempting to cover one up. When a mistake is made it is usually inadvertent and there may be no reason to believe that the mistake will necessarily re-occur. Further, as OPG argues, the incident can be used as a learning opportunity to minimize the chance of similar errors being made in the future. However, when someone engages in an attempt to cover up a mistake the individual's conduct is deliberate and hence there is reason to be concerned that the individual may do the same in the future. The fact that the individual would put their own

> interests ahead of ensuring the error is rectified is problematic and gives rise to concerns about whether the individual can be trusted in the future. If the individual was successful in covering up the error the opportunity to learn from the incident and prevent future similar errors is lost. [emphasis added]

The applicant submitted that when the Board in paragraph 116 was discussing "the nature of the discipline imposed by OPG on others involved in the incident" it was analyzing the decision of OPG to ban the two grievors by assessing the equivalency of the penalties imposed on others and the seriousness of the offence to assess the appropriateness or "justness" of the penalty. That, the applicant submits, is precisely what an arbitrator does when determining whether a disciplinary sanction meets a just cause standard.

62. I do not accept the applicant's characterization of the Board's analysis in that decision. In my view, the Board was clearly instructing itself about what the issue was when it described the question it had to answer as "whether OPG's decision to ban [the grievors] from its job sites was justified." It again described the issue it was addressing at the end of paragraph 116 when it wrote: "The issue is… whether the fact that Messrs. Griffith and Maitland tried to cover up the incident justifies them being banned from all OPG sites." The Board in that decision was not deciding whether OPG had just cause to ban the grievors from its site. Rather, it is clear to me that the Board in that case was determining whether OPG had justification for its decision to ban them.

63. I also do not accept the applicant's submission with respect to the relationship between sections 35.7 and 36.2 of the EPSCA Agreement. The Board in its March 31st decision in this proceeding distinguished between the "just cause" provision found in section 8.6(b) of the EPSCA Agreement that applies when an employer bound by the EPSCA Agreement disciplines or discharges an employee and the obligation imposed by section 35.7 of the EPSCA agreement on a party bound by that agreement with the power to affect the employment of an individual who is employed by a third party employer. Section 36.2 of the EPSCA Agreement gives an arbitration board jurisdiction to modify a penalty when it determines that the employee has been disciplined or discharged for cause.

64. It seems to me that the power conferred on an arbitration board by section 36.2 relates only to an arbitration board that is dealing with a grievance arising under section 8.6(b), which the Board has already held does not apply to OPG because it was not the employer of Mr. Marshall. Both section 36.2 and section 8.6(b) refer to discipline or discharge for cause. The words used in section 35.7 do not. They are, in my view, markedly different.

65. As I had observed in the March 31st decision in this matter, the Board had jurisdiction to deal with the applicant's grievance against OPG under section 35.7. The Board noted at paragraph 36 of that March 31st decision that OPG's determination to ban Mr. Marshall came within the scope of section 35.7 because it was either a "termination" or "disciplinary action" or both. It seems to me the parties' choice of the term "disciplinary action" in section 35.7 rather than the term discipline which is used by the parties in both sections 8.6(b) and 36.2 suggests they intended disciplinary action to mean something other than discipline for cause. While the

use of the term "disciplinary action" does encompass "discipline" or "discharge for cause", in my view that term also encompasses matters that are not. I also note that section 36.2 does not refer to a grievance over a "termination" which is one of the terms used in section 35.7 which again suggests that the power in section 36.2 cannot be used by an arbitration board to ameliorate a termination under the EPSCA Agreement.

66. Section 35.7 requires a party that is not the employer of the affected employee to demonstrate it is justified in making a decision that results in the termination or imposition of a disciplinary sanction on that employee. The Board in its March 31st decision in this matter did not attempt to articulate what the standard under section 35.7 was. The Board did, however, make it clear that the just cause standard found in section 8.6(b) did not apply to OPG as it was not Mr. Marshall's employer. The Board at paragraph 33 of that decision wrote:

> Section 35.1 of the EPSCA Agreement establishes the scope of matters that can be grieved through the procedure established by articles 35 and 36. A grievance can only be a dispute about an "interpretation or application of particular clauses" or "about alleged violations" of the EPSCA Agreement. Section 35.7 permits a grievance alleging "unjustified termination, discharge, suspension, or disciplinary action" to be initiated at the first step of the grievance procedure. While I accept that section 8.6(b), which expressly provides the employer of an employee may "discharge and discipline any employee for just and sufficient cause", is applicable only to the actual employer of the employee in issue, in my view, section 35.7 does more than simply establish a procedure for dealing with grievances alleging a violation of section 8.6(b).

The Board then wrote at paragraphs 36 and 37:

> 36. ...When OPG issued the March 11th letter notifying the applicant Mr. Marshall would not be permitted to work at any of its sites, it was acting to prevent Mr. Marshall from being employed in the future by any contractor at its sites. The decision made by OPG was completely independent of the employment relationship Mr. Marshall had with Aecon and was unrelated to anything done by Aecon in respect of Mr. Marshall's employment. I find OPG's action comes within the scope of section 35.7 of the EPSCA Agreement on the basis that it was either a "termination" or "disciplinary action" or both.
>
> 37. In the result, I am satisfied that OPG must establish its decision to bar Mr. Marshall from its sites meets the standard established by section 35.7 of the EPSCA Agreement.

67. I do not accept the applicant's submissions that a grievance claiming "unjustified" termination or unjustified disciplinary action requires the entity that is not the employer of the employee affected to demonstrate that it had "just cause" for its decision. The notion of "just cause" incorporates a wide spectrum of considerations that have no applicability to an entity that is not the employer of the affected employee. For example, an employer may have access to its

employee's personnel file and disciplinary record. The third party bound by the collective agreement does not. Just cause also imports the notion of progressive discipline and procedural fairness in assessing whether the employer had taken proper steps in making its determination. An employment relationship with the affected employee does give rise to those kinds of considerations.

68. A third party or stranger to an employment relationship between an employer and employee that is also bound by the same collective agreement as the employee's employer, whether an owner of the construction project where the work is being carried out or another contractor on that project, may not have the authority to interfere in or manage that employment relationship. The third party's ability, if any, to affect the employment relationship between an employee and the employer of that employee is dependent upon the contractual relationship between the third party and the employer. It is, in my view, inappropriate to impose obligations on that third party that arise from an employment relationship when that third party may not have the ability or authority to affect how that employer administers its employment relationships with its employees.

69. In this case, OPG was the owner of Pickering NGS. It engaged Aecon to perform work on its facility. OPG did not have a direct relationship with the employees of Aecon, including Mr. Marshall. It was up to Aecon to manage, supervise, direct and control its employees. OPG had an interest as the holder of the CNSC operating licence for Pickering NGS in ensuring that anyone who was on its premises and carried out work there was qualified to do that work in the same way that an owner of a construction project has an interest in ensuring, if not a statutory obligation to ensure, the contractors and employees carry out work on that project in accordance with the *Occupational Health and Safety Act*. (See for example *E.S. Fox Limited*, [1989] OLRB Rep. July 746; *Mid South Contractor Ltd.*, 2006 CanLII 19017 (ON LRB)) In my view, OPG in protecting that interest made a determination that the falsification of its training records warranted banning Mr. Marshall from all of its facilities just as an owner of a construction project may well be justified in barring from that project a worker who deliberately flouted its safety policies. The issue therefore is whether that decision by OPG to ban Mr. Marshall met the standard created by section 35.7 of the EPSCA Agreement.

70. Section 35.7 envisions a grievance alleging unjustified termination or disciplinary action. It seems to me that once an allegation has been made that "termination" or "disciplinary action" was taken in respect of an individual, the party that made the decision giving rise to the termination or disciplinary action must demonstrate that it was "justified". In other words, the burden of persuasion and proof falls on the party that must "justify" the decision on which the termination or disciplinary action is based.

71. The applicant submitted that the justification required by section 35.7 is synonymous with "just cause". OPG on the other hand submitted that justification is not just cause, but rather is the provision of a rational or *bona fide* basis for the decision that was taken.

72. I have already determined that the justification for the decision required by section 35.7 of the EPSCA Agreement is something other than just cause.

73. OPG submitted that the word "unjustified" means the absence of reasonable grounds or rational justification. It referred to the definition of "unjustifiable" in Stroud Judicial Dictionary, 4th edition which provided the following definition:

> To be unjustifiable, the things done will be shown to be lacking in excuse or defence on any reasonable ground, that is to say, inexcusable and indefensible in the relationship of the same to the claimant for relief.

OPG also referred to the definition of "just cause" in that same dictionary:

> "Just cause" does not mean the same as "proper" cause; "proper" meaning only "fit, apt, suitable" whereas "just" has a wider meaning involving equitable considerations

OPG argues that the use of the term "unjustified" in section 35.7 of the EPSCA Agreement suggests that the standard that it has to meet in order to succeed in persuading the Board that its decision was not "unjustified" does not involve any equitable considerations, but rather must focus on whether OPG had a rational, *bona fide* or reasonable basis for its decision. It submits that unless the applicant can demonstrate that its decision was capricious or arbitrary or made in bad faith or for some ulterior motive when a reasonable or rational foundation for its decision has been advanced and proved, the Board must find the decision by OPG that gave rise to the "termination" or the "disciplinary action" resulting in Mr. Marshall being banned from its facilities was not unjustified.

74. The use of the word "unjustified" in section 35.7 of the EPSCA Agreement suggests to me that in order to succeed OPG must demonstrate that it had "justification" for its decision. That is, OPG must justify or, in other words, explain the reasons for its decision and those reasons must provide a rational foundation for that decision. If the reasons OPG does advance are rationally connected to the decision it made, and the applicant fails to prove that the decision was made in bad faith or was arbitrary, then OPG would have met the standard imposed on it by section 35.7

75. The applicant's theory of its case in respect of OPG was that OPG was in some way at least partially responsible for what Mr. Marshall had done by putting unreasonable demands on Aecon and by not permitting Aecon some leeway in getting its supervisors qualified. The applicant also suggested that OPG was aware that contractors like Aecon had permitted, if not encouraged their employees to do CBT modules for others in order to meet the demands for qualifications and was using Mr. Marshall as a scapegoat for its own failure to monitor what its contractors, including Aecon had been doing in respect of CBT modules.

76. The applicant also submitted that OPG's cursory investigation of the incident and the wide disparity between its response and the response by Aecon demonstrates that OPG reacted unreasonably when it imposed the lifetime ban on Mr. Marshall at all its facilities.

77. Aecon imposed a one week suspension on Mr. Marshall yet OPG imposed the most serious penalty available, a lifetime ban from working at any of its facilities. The applicant points out that the ban extended not to just its nuclear operations, but to the OPG hydro generation and thermal plants too. The applicant strenuously argued that OPG relied exclusively on what it learned from Aecon about the incident without investigating the matter for itself and that it was in Aecon's interest to blame Mr. Marshall rather than accept responsibility for the attitude within Aecon that gave rise to Mr. Marshall doing the CBT modules for others.

78. In my view, Aecon's disciplinary response to Mr. Marshall's conduct is irrelevant to whether the OPG decision was justified. Aecon's interest was in having Mr. Marshall, a skilled and experienced pipefitter available to it to carry on its work when it was short staffed. OPG on the other hand was concerned with preserving the integrity of its TIMS records and its reputation as a responsible operator of a nuclear facility.

79. Although the applicant had suggested from the commencement of its case that there was widespread fraudulent performance of CBT modules at Pickering NGS there was no evidence led by the applicant to prove that serious allegation. Indeed, Mr. Marshall conceded that the first time he was aware of anyone doing a CBT module for someone else was during the week prior to the day he did the CBT modules for two other employees. The applicant called no evidence and provided no particulars of any other incident where that had occurred in respect of Aecon, OPG or any other contractor at Pickering NGS.

80. Moreover, it seems to me that if the practice with respect to CBT modules being completed by supervisors or managers on behalf of employees the applicant had alluded to had in fact existed at Aecon and had been engaged in by Mr. Milton and others previously, Mr. Milton would not have been as circumspect in making the suggestion that Mr. Marshall said he had made during their conversations. Mr. Marshall agreed that Mr. Milton had never told him to do the CBT modules for others in order to get them qualified. Mr. Milton did tell Mr. Marshall that those CBT modules had to be done and that Aecon had to succeed. Surely if what the applicant had alleged about the widespread and well known fraudulent use of the CBT modules was in fact the case, then when Aecon was faced with the shortage of qualified supervision because of the resignations that had occurred recently it would have been much more direct with Mr. Marshall about getting him to do that.

81. I therefore conclude on the evidence presented that OPG was neither aware of any prior improper or falsified CBT modules being submitted by Aecon or any other contractor at Pickering NGS nor complicit in Mr. Marshall having performed the CBT modules for others because it assigned work to Aecon and did not permit Aecon to do that work with unqualified supervision. OPG as the owner with a contract with Aecon demanded, as is its right, to have Aecon carry out the work OPG assigned to it.

82. OPG through Mr. Arnone explained what steps it took to find out from its contractor what had occurred. Indeed, there was no dispute that Mr. Marshall had in fact performed the CBT modules for two other tradesmen and that as a result, the OPG TIMS records were falsified.

OPG viewed the falsification of its training records that were subject to audit by the CNSC as a very serious matter, in relation to both its operating licence and its reputation.

83. The ultimate decision taken by OPG was explained by Mr. Arnone. That decision was made after reviewing the relevant facts that had been presented to it about the incident and the reasons for it, the serious nature of the offence, and its concerns for the integrity of its training records. It determined that it could not permit Mr. Marshall, who had been prepared to and did falsify those training records, to work at any of its facilities because OPG did not want to have Mr. Marshall in a position where it might have to rely on documents for which he was responsible.

84. OPG has demonstrated that its decision to bar Mr. Marshall from its facilities was not unjustified. OPG has provided a rational basis for its decision. While a somewhat less drastic response by OPG might well have been reasonable (I note in that regard that Mr. Arnone had recommend to the OPG executive committee that Mr. Marshall be banned from working at only its nuclear facilities) OPG through Mr. Arnone provided ample justification for its decision. That decision was directly related to the conduct that Mr. Marshall admitted engaging in.

85. OPG has established a rational basis for its decision to impose a lifetime ban on Mr. Marshall working at any of its facilities that is directly related to the improper conduct in which Mr. Marshall had engaged. The applicant has not demonstrated that the decision made by OPG to ban him from all of its facilities was arbitrary, capricious or made in bad faith.

86. In the result, I am satisfied that OPG met the standard imposed on it by section 35.7 of the EPSCA Agreement.

LIABILITY OF AECON

87. The applicant contends that Aecon ought to be responsible for the losses incurred by Mr. Marshall as a result of the decision taken by OPG. It contends that Mr. Marshall engaged in that conduct at the behest of Aecon management, and in particular Mr. Milton and Mr. Norris.

88. Mr. Marshall's evidence, as indicated earlier, does not support that theory. I accept that Mr. Marshall had been put under a great deal of pressure to get people qualified. He said that someone had done a CBT module for him earlier in the week and that was the first time that had ever occurred. He also agreed that Mr. Milton had not directed him to do the CBT modules for others but that is what he understood he was supposed to do. He also testified that Mr. Norris was well aware of what was taking place and did not object to it.

89. In my view, the applicant has failed to establish that Aecon had developed a practice by which its supervisors would perform CBT modules for employees in order to have them qualified. There was only one incident referred to in the evidence in which Mr. Marshall contended that Mr. Milton had arranged for someone to complete a CBT module for Mr. Marshall. Mr. Milton denied it.

90. Assuming that the one CBT module had been done for Mr. Marshall by someone at Aecon, I do not accept that that one incident provides a legitimate reason for Mr. Marshall to have undertaken to carry out those CBT modules for others. Mr. Marshall admitted in his cross-examination that OPG took TIMS and its training records very seriously. He also acknowledged that he knew that by doing those CBT modules for others he was undermining the integrity of TIMS and the training records maintained by OPG.

91. Mr. Marshall was a general foreman and as such had managerial responsibilities.[4] It seems to me that someone in Mr. Marshall's position, when faced with a deadline and competing priorities had to decide how to best meet the obligations imposed on him. Deciding how to best meet those obligations cannot in my view include falsifying records. I reject the submission that Mr. Milton or Aecon bore any responsibility for Mr. Marshall's decision to engage in that conduct. It is unreasonable for someone in a managerial position who is required to get people qualified for the work that is to be done to think that it is acceptable to falsify training records to show that they are qualified even if there was one prior incident where someone else had falsified a training record. Simply put, someone with managerial authority cannot justify his or her decision to engage in the falsification of significant documentation or successfully assert the employer bears the responsibility for that falsification because someone else had done the same thing once before.

92. When Mr. Milton was putting pressure on Mr. Marshall to get the work done and telling him that Aecon cannot fail he was letting Mr. Marshall know that it was up to Mr. Marshall to decide how to achieve that result. He was not, in my opinion, telling or even suggesting to Mr. Marshall that in getting his work done he should do CBT modules for others.

93. Mr. Marshall did not seek permission to schedule people to report for work on an overtime basis because he understood that OPG would not pay for the overtime. He did not go back to Mr. Milton to seek approval for some other way to achieve the objectives that had been assigned to him. It seems to me that if Mr. Marshall was faced with an "impossible situation", as the applicant suggested, as a result of the pressure being put on him by Mr. Milton, he could have chosen to schedule overtime and face the consequence of having Aecon responsible for paying for that overtime without being compensated by OPG. Mr. Marshall did not even consider that possibility. Instead he decided to falsify training records by signing in to the OPG training system using the employee numbers of two other Aecon employees and doing CBT modules for those employees so that TIMS would show them qualified to do the work that Mr. Marshall wanted to assign to them.

94. In the result, I am not persuaded by the applicant that Aecon is liable for any of the losses incurred by Mr. Marshall as a consequence of the decision taken by OPG to ban him from its facilities.

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[4] Section 9.2 of the EPSCA Agreement provides: "The parties recognize the responsibilities of foremen and subforemen to discharge their managerial duties. If the Union feels that the foreman or subforeman is not discharging his managerial duties in a manner that is fair and equitable, or if an Employer feels that the Union is interfering with the foreman or subforeman in the performance of his managerial duties….

95. The applicant in its grievance also alleged that Aecon had improperly laid off Mr. Marshall when Mr. Marshall was no longer permitted to work at Pickering NGS. It submitted that Aecon had not provided evidence that it had no other location or position where it could have assigned him after he had been banned from OPG.

96. A construction subcontractor may properly lay off an employee who has been prevented from working at the subcontractor's project by the owner or general contractor responsible for that project if the subcontractor does not have other work available for that employee. See *E.S. Fox Limited, supra* and *Mid South Contractor Ltd., supra.*

97. In a grievance alleging improper layoff, the burden of proof is on the union alleging that the layoff was improper. In this case there is no dispute that Mr. Marshall was laid off by Aecon when he was no longer permitted to work at Pickering NGS. At that point, Aecon was, at the very least, entitled to layoff Mr. Marshall from that location.

98. The applicant contends that Aecon had failed to establish that there were no other positions available at any of its other projects to which it could have assigned Mr. Marshall. The applicant is correct. Aecon did not call any evidence to establish that it had no other projects or positions available to which Mr. Marshall could have been assigned.

99. In my view, it is up to the applicant to demonstrate that the layoff of Mr. Marshall was improper and contrary to the EPSCA Agreement. In order to do so, it seems to me it was up to the applicant to allege and then prove that there was other work available to which Aecon could have assigned Mr. Marshall. It did not do so. The legal burden of proof was not on Aecon to demonstrate it had no other work available for Mr. Marshall. Rather, the applicant, in alleging that the lay off was improper, was required to show why it was improper. The applicant called no evidence or indeed did not even suggest in its argument that there was other work available to which Aecon should have assigned Mr. Marshall.

DISPOSITION

100. OPG has established there was a reasonable basis for the decision it made to ban Mr. Marshall from its facilities. The applicant has not demonstrated that OPG acted in bad faith or for some ulterior motive when it made its decision or that its decision was arbitrary or capricious. In the result, OPG has demonstrated its decision met the standard imposed on it by section 35.7 of the EPSCA Agreement.

101. The applicant has also failed to establish that Aecon either directed or encouraged Mr. Marshall to engage in the conduct that gave rise to the decision by OPG to ban him from its facilities. As a result, the Aecon is not liable to compensate Mr. Marshall for any losses he may have suffered as a consequence of the decision taken by OPG to ban him from its premises.

102. Finally, the applicant has not established that Aecon's decision to layoff Mr. Marshall from employment was contrary to the EPSCA Agreement. The applicant has neither alleged nor proved that Aecon had other work available to which it might have assigned Mr. Marshall.

103. In the result, these two grievances are dismissed.

2013-09-G; 2019-09-G; 2020-09-G; 2739-09-G International Union of Elevator Constructors Local 50 and International Union of Elevator Constructors, Local 96, Applicants v. **Otis Canada Inc.**, Responding Party.

Construction Industry Grievance – The union filed three grievances relating to the introduction of "telematics" (technology which provides information about a vehicle's use) in company vehicles, arguing that it was a unilateral change in working conditions and an unwarranted invasion of employees' privacy, with an impact on hours of work and remuneration; a fourth grievance was filed, relating to one employee's suspension for violating the "no personal use" of company vehicles policy – The grievances generally involved personal use of company vehicles, as well as compensation for time spent picking up and dropping off company vehicles by those employees who no longer wanted to take them home – The employer submitted it had a "no personal use" policy, but the union countered that "reasonable" personal use was tacitly accepted – The employer argued that the telematics device was introduced to monitor its assets not to track employees' whereabouts – The Board found that the collective agreement permitted the installation of telematic-like devices for reasons of efficiency and economy, and the employer was permitted to monitor vehicle use at all times – The Board also found that although there were inconsistencies in the application of the "no personal use" rule, with the introduction of telematics, the employer was able to enforce the rule strictly, and had given the union adequate notice of this new enforcement policy; the policy was a reasonable one – If employees choose to drop off/pick up their company vehicle at a location other than their home, the time spent travelling to and from the vehicle is not compensable – Since the communications around personal use were equivocal, the individual employee's two-day suspension was reduced to a written warning – Three grievances dismissed; fourth grievance allowed

BEFORE: Marilyn Silverman, Vice-Chair.

APPEARANCES: *Barrie Chercover, Carlo Di Giovanni, Ben McIntyre, Sean McCormick, Steve Sampson* and *Mike Fletcher* appearing on behalf of the International Union of Elevator Constructors, Local 50; *David Jewett* and *Ron McNevin* appearing on behalf of the International Union of Elevator Constructors, Local 96; *Patrick Moran* and *Ken Litteral* appearing for Otis Canada Inc.

DECISION OF THE BOARD: January 21, 2013

1. These grievances concern the introduction and use of Telematics devices by the responding employer ("Otis" or the "company" or the "employer") in company vehicles. As elaborated on further in this decision, Telematics provides information about aspects of the vehicle's use.

2. The company's position is that it is entitled to modernize its equipment and to introduce efficiencies in operation. The applicants, International Union of Elevator Constructors Local 50 ("Local 50"), the Toronto Local and International Union of Elevator Constructors, Local 96 ("Local 96"), the Ottawa Local, have a variety of objections to the use of these devices. Reference to the "union" refers to both locals. Where I need to distinguish between them I refer to the individual local. The union asserts that the introduction of these devices represents an unreasonable change in working conditions specifically related to off duty activity and an invasion into the privacy of members. Further they have advanced other objections about how the introduction of Telematics led to a change in working conditions in hours of work and travel compensation.

3. Otis is in the business of constructing, maintaining and servicing elevators. It operates in a broad geographic area. Its employees are required to travel to different locations. Some routes expand over a large geographic area. For that reason employees may use company vehicles. The use of the company vehicles allow the employee to store parts, travel to different work sites and pick up other workers if working in a crew. Generally, employees who drive company vehicles are allowed to take them home. There are advantages to both the company and the employee in this arrangement. The introduction of the Telematics device has given rise to a number of issues in the practice of employees taking vehicles home.

4. There are four grievances. Three deal with the introduction of Telematics; the union's position that it is a unilateral change in working conditions and an unwarranted invasion of privacy as well as having an impact on hours of work and payments. The last one deals with a suspension grievance of an individual employee represented by Local 96.

5. The Telematics device monitors when the vehicle is turned on and off. It does so irrespective of the time of day and therefore, whether or not the driver is on duty. The Telematics device has GPS capability, which is not enabled.

6. One of the main disputes is whether employees who take vehicles home have ever been entitled to personal use of those vehicles. The union says they have and describes practices including grocery shopping, medical visits, attendance at union meetings, and stopping for dinner on the way home.

7. The employer asserts that the rule has always been that "no personal use" of the company vehicle is allowed. As of the introduction of the Telematics device, the employer is able to monitor the use of the vehicle when the employee drives the vehicle when not on duty. The union says that the company has implemented new rules; the company says that the Telematics device simply enables it to enforce its already existing rules to a more refined degree.

8. Following the introduction of Telematics by Otis a further dispute arose about whether employees were required to take company vehicles home and compensation for time spent picking up and dropping off the company vehicle at a designated spot for those employees who no longer wanted to take the vehicle home.

9. On the major areas of dispute the interests of the two locals are allied. There are factual differences which are highlighted in the decision that impact the two locals differently. One is that Ottawa has a large geographic municipality as the areas of service encompass Kingston, Smith Falls, Belleville, Brockville and Cornwall. Also, parking concerns in and around the Ottawa area are not as difficult as those in the Toronto area. In Ottawa the vehicles can be parked closer to the work sites, thus resulting in shorter travel time.

10. The employer says that Telematics is simply an efficient instrument to record the use of its asset. It does not survey where the vehicle is, but measures its operation. As such, it does not tell the company where an individual is, only whether the company vehicle is in use. The company says that the collective agreement gives it the right to collect this information.

11. The company reiterates that no one is required to take a vehicle home (other than those employees who are "on call" who are the subject of different considerations and are compensated). In the event an employee who uses a company vehicle does not wish to take the company vehicle home, Otis will find a parking spot on the employee's route and he/she can pick up the vehicle there. A member of the bargaining unit can therefore refuse to take a company vehicle home and will be provided with a spot to pick up and drop off the vehicle. This alternative then gives rise to the travel time payment issue.

The Introduction of Telematics at Otis

12. Mirko Grubiso is the national purchasing manager for Otis in Canada. His job is to improve productivity and find cost savings for the company. In the spring of 2008 he reviewed fleet contracts for the period 2004-2007 and noted increasing costs in fuel consumption, maintenance, rentals and accidents. Given the fixed costs of leasing, Mr. Grubiso surmised that the area with cost saving potential was fuel consumption. Of course, reduced fuel consumption can be achieved by reduced driving. Mr. Grubiso initiated a manual method of calculating gas purchased and reviewed those results with the branch managers. The leasing company that provides the Otis vehicles suggested one way to reduce fuel consumption was to use Telematics.

13. Mr. Grubiso suggested this idea to the president of Otis. It was approved. Otis began the process of implementation of Telematics on the company fleet of vehicles.

14. Ken Litteral is the Senior Field Operations Manager with Otis. Mr. Litteral has worked for Otis for 26 years, beginning as an apprentice elevator mechanic. He is the person involved in the implementation of Telematics, the rules for its use and monitoring and meeting with managers and union representatives for the roll out and continued application of the Telematics system. Mr. Litteral reviews reports. If there are issues about vehicle use, he raises

those with the branch manager who in turn speaks to the employee involved. If further investigation is warranted, Mr. Litteral deals with the issue.

15. Mr. Litteral worked in Canada for four years as a Regional Field Operations Manager. He says Otis always had a consistent "no personal use of company vehicle" policy. He familiarized himself with the agreements and local practices before the introduction of Telematics. Unless there was damage to a vehicle or someone was actually seen driving for personal use, there was no way for management to know whether there was personal use of a vehicle. When Mr. Litteral was asked if he knew that members of the union used company vehicles for personal use, he advised that he knew this only from testimony and reiterated that before the introduction of Telematics there was little opportunity for the company to scrutinize personal use. Before Telematics the company would have no direct way of knowing if the company vehicles were being used on weekends or after work. In that regard there would have been no or limited discipline imposed for personal use of the company vehicle.

16. Mr. Litteral agrees that activities that an employee engages in after hours are not the company's concern, nor does the company have any entitlement to that information, provided it does not affect ability to work.

17. In April 2009, the company decided to roll out Telematics in Hamilton as a test run. That involved a meeting with employees where they were provided with a Power Point presentation about the system. The company outlined the objectives it hoped to achieve with Telematics and the acceptable usage of company vehicles.

18. The presentation defined authorized use as being for company business and driving to and from work. The presentation covered permitted and prohibited use. Mr. Litteral also said that employees were told that unauthorized use would result in discipline and termination. Specifically, included in prohibited use was "driving during non-work hours during the week and weekends" Mr. Litteral said the "no personal use" rule had been in place at Otis for years.

19. The relevant portion of the Otis Fleet Manual provided to employees states as follows: "SERVICE, REPAIR AND DELIVERY VEHICLES OPERATED BY FIELD HOURLY EMPLOYEES ARE:

- For Company use only. **No personal use is allowed**. (home to work location and return is considered company use).

20. The PowerPoint presentation explained the Telematics device and its purpose, including the projected fuel savings to the company. The presentation identified the information the device provides: the date and time the engine is started and turned off, the total number of kilometres driven per day, the time the vehicle is moving or stationary, the stop time between trips, and the gas consumption. Although the device can record speed, it does not do so. The PowerPoint presentation specifies that the Telematics device will not track locations throughout the day.

21. Mr. Litteral showed and reviewed the power point presentation with Ben McIntyre, business manager of Local 96 and reviewed a sample report to show what information would be provided on the Telematics used. Mr. McIntyre expressed concern about the bargaining unit having a negative reaction to the introduction of the Telematics system and said he would not be surprised if the employees in his area refused to drive the company vehicles.

22. Mr. Litteral explained the basic ways employees service the elevators. Most maintenance, repair and construction employees have company vehicles. More maintenance than construction mechanics have vehicles. There are also local representatives who service remote areas over a large geographic area, generally on a 24/7 basis and they too are provided with company vehicles.

23. Employees on a route to a number of separate buildings use either a company vehicle or their personal vehicle. In the latter event the employee is reimbursed for mileage. If the company vehicle is used the tools and parts are stocked in that truck. Routes may change a few times a year and, depending on the service contracts or other customer driven changes, a vehicle assignment may also be changed.

24. Some employees do not need a vehicle because their route encompasses two or three large building towers where they walk to their jobs. In that case the tools and parts are stocked in the buildings and there is no need for a vehicle for storage of parts. Obviously, it is advantageous to stock parts and tools in a company vehicle. Inventory in a building is reduced and the elevator mechanics have a ready supply of tools, equipment and material.

25. In June 2009 Telematics devices were installed in vehicles in Hamilton. Mr. Grubiso analyzed the Telematics reports in August 2009, compared them to the same three month period in 2008 and concluded that there was a substantial (18%) reduction in fuel consumption. The company then decided to implement the system nationally; to be completed by December 2009. There were to be three locations in which the device was to be introduced in September/October 2009: Ottawa, Mississauga and Toronto. After those areas, the presentation was made to the branch managers who in turn would present to their employees. The presentation to the managers and employees described what the device recorded and the company's expectation as to the use of the vehicle.

26. The presentation in Ottawa was overseen by Guy Charbonneau the manager for that branch. Mr. Charbonneau has been with Otis since 1990 in various sales and managerial capacities. He held a meeting attended by the supervisor, elevator mechanics, and Mr. McNevin from the union. He distributed the written materials, showed the PowerPoint presentation and answered questions. When asked about personal use Mr. Charbonneau answered that it was not allowed but, if asked in advance, he could authorize a request. At that time the supervisors could also authorize a request for personal use.

27. Mr. Charbonneau recalled giving permission to two employees who wanted to use a truck to move something; which he allowed.

28. Mr. Charbonneau said that before the meeting he was not aware that employees were using vehicles for personal use.

29. The service provider of the Telematics device provides the report to Otis. Messrs. Grubiso and Litteral are able to download the reports from a secure website. Mr. Grubiso downloads the reports every Friday morning. The reports present vehicle number, by branch, by day. Mr. Grubiso then summarizes them by branch and provides the summaries to Mr. Litteral.

30. Mr. Grubiso said that the most prevalent aspects of the report in the category of unauthorized use was on holidays, when on WSIB, on weekends and the appearance of short work days.

31. Another review done for the full 2010 calendar year showed that fuel consumption was reduced, fewer kilometres were driven and CO2 emissions were reduced. Mr. Litteral said that the reduction in mileage was 4,000-5,000 kilometres per vehicle over the course of one calendar year.

32. Mr. Litteral explained how he approaches the information on the summary. He receives a separate report for each of the 11 Otis branches in Canada, which includes information on about 200 vehicles. The report shows the driver, a vehicle number, the time of the first and last stop of the day. He sees if there is overtime or night time use and compares the information. What Mr. Litteral cannot identify is where the vehicle or the mechanic is located.

33. If the information that Mr. Litteral checks looks reasonable and consistent, he does not investigate further. If Mr. Litteral identifies an inconsistency between the report and the time sheet, he highlights the issue and provides a copy to the branch manager who must follow up. If the branch manager does not have a satisfactory answer for the discrepancy, the mechanic whose information is inconsistent will be questioned, usually with a labour relations representative in attendance.

34. The reason Mr. Litteral chooses to do this exercise personally is that he wants to achieve national consistency on application and discipline.

35. Mr. Litteral says that if there is unauthorized personal use, discipline will be issued. Mr. Litteral decides on the level of discipline and that directive is conveyed to the branch manager to administer.

36. Mr. Litteral described the circumstances in which he will approve personal use of a company vehicle. A supervisor or branch manager can do so under the guidance set out by Mr. Litteral. If an individual has an ill relative they could stop by the hospital on the way home to visit. If there is a routine or repetitive event (e.g. a ball game once a week), this is not permitted. It should be noted that employees are not permitted to carry either passengers who are not Otis employees or personal non work related belongings in the company vehicle. Attendance at an educational program is permitted. Mr. Litteral would not question a five or ten minute stop on

the way home, but he would generally question anything that extended beyond 7/7:30 in the evening. Mr. Litteral said that he does not "question if before 6 because you have to have some leeway"

37. Mr. Litteral believes that his approach to the use of the company vehicle is a fair one. He allows some leeway in employees arriving at home and making short stops (i.e. 5 or 10 minutes for gas, parts, groceries, a burger). He would not question those. He does, however, question the company vehicle being used in the evening beyond a reasonable time to arrive home and any weekend use. Mr. Litteral's rationale is that although the company has no right to know what an employee does after work and where they go, the company does have the right and the responsibility to know what happens to its vehicles outside of working hours. This arises from both an economic and a liability perspective.

38. Mr. Litteral concedes that although it is not the company's affair what activities an employee engages in after work, if the individual seeks to have the company vehicle in use other than as prescribed, they must tell the company what they are doing and obtain approval.

39. The Company provides alternatives for employee who do not wish to drive the company vehicles to and from home. Provided there is sufficient notice, the company will find a parking spot on or near the employee's route or work station where the employees can pick up the vehicle. The company advises that the work day would be paid from the time the employee arrived at the first job and not when they arrived at the parked company vehicle. The only "portal to portal" payment is on an overtime call back. Also when an employee is "on call" they are permitted reasonable personal use because the employee must be available to the company.

40. Mr. Litteral describes the scenario where an employee did not want to drive a vehicle once the Telematics were installed and his route was changed so he could drive his personal vehicle. In the case where a mechanic uses his own vehicle, mileage is paid from the first stop to the last – no commuting to and from home is paid. There is no collective agreement requirement for an employee to drive a company vehicle home and park it on his personal premises.

41. In the course of this proceeding the union examined certain witnesses on another device used by Otis, the PDA, a separate hand held device that the elevator constructor enters information on. The PDA is similar to a cell phone where mechanics enter the time they arrive at a building, enter a description of work completed and the time they finish. Employees do not have to keep the PDA on during their lunch break. They log off after work. They are encouraged to record activity on the PDA as it occurs (in real time) but that is not always done. Although the PDAs too have GPS capability, it is not used. If an individual enters the time he enters and leaves a building, the PDA can determine the location of the individual, if done in "real time" This device is mainly used by maintenance mechanics as distinct from construction. The PDA has effectively replaced paper reports of time.

The Evidence of Local 50, the Toronto Local

42. Michael Fletcher worked for Otis on the tools for 32.5 years and is a member of Local 50. He left in 2004 to accept a position in the Toronto local's educational program.

43. Mr. Fletcher recalls that company vehicles were introduced in the early 1980s. He started to use one in March 2001. He was paid from the first to the last job, except when he was on call in which event he was paid for all mileage. Parking was reimbursed while at the job site.

44. Mr. Fletcher described his experience with driving a company vehicle and personal use of that vehicle in the time before the introduction of Telematics.

45. Mr. Fletcher's supervisor told him that the company vehicle was to be used to and from work and that there were no restrictions on stopping on the way home if the route was direct. Once home, the vehicle was not to be used again until the next work assignment. The only exceptions to this was on call or servicing of the vehicle including gas.

46. Mr. Fletcher described how he was active in the union education programs and had been a union executive. This necessitated him attending meetings after work. He took the company vehicle to the meetings because it would have been impossible to drive to his home in Courtice, leave the company vehicle, take his own vehicle and then return on time to a meeting in Toronto. Those meetings begin at 6 and run for about an hour or two.

47. Also for a period Mr. Fletcher visited his ill mother in the hospital after work and drove his vehicle home later in the evening. Mr. Fletcher would also go to physiotherapy with the company vehicle, sometimes stopping to buy cigarettes, coffee or other errands on the way home. Mr. Fletcher said that his supervisors were aware that he used the company vehicle for these activities after working hours. He would not have been able to use the company vehicle were he not able to use it in this way.

48. Mr. Fletcher said that his gas consumption, maintenance and mileage were monitored and he was asked about those from time to time. After a time these reports were monitored by the leasing company that owned the vehicles and the drivers did not have to personally monitor those expenditures.

49. Mr. Fletcher described the advantage of the company vehicle in that it could store parts that he needed for his work and he would then not have to wait until they were delivered to him. Also he had the advantage of an expense free commute to his home in Courtice.

50. Ben McIntyre is the business manager of Local 96. Mr. McIntyre has been active in the union since he became a member in 1986 and has progressed through the ranks in the union.

51. Mr. McIntyre was involved in contract negotiations in 2007 and 2010.

52. He first became aware of GPS-type equipment when it was installed in company vehicles in the United States. There were concerns expressed over the monitoring and tracking of members.

53. During 2007 bargaining the union proposed that GPS not be the basis for discipline. At the time there were no such devices in use in Canada and the proposal was rejected by the employer. The proposal was not pursued.

54. In June/July 2009 Mr. McIntyre was notified that Telematics would be implemented within a week. He was invited to attend a meeting. Present at that meeting with Mr. McIntyre was a supervisor, Hugh Richards, and Mr. Litteral. Mr. McIntyre was shown a PowerPoint presentation that was to be presented to the employees about the devices installed in the vehicles. It was Mr. McIntyre's understanding, gleaned from the PowerPoint and the meeting, that Telematics would track starts and stops, speed and excessive braking. It would also track misuse or unauthorized use. As it later became evident, the company did not track speed or excessive braking.

55. Also explained to Mr. McIntyre were the method by which the company would generate reports from the Telematics information and what would be done with those reports. The reports contain the information recorded as starts, stops, excess speed, harsh braking and mileage. The union was told that Mr. Grubiso and Mr. Litteral would review these reports weekly and if there would problems they would be conveyed to the appropriate branch manager who would raise it with the driver.

56. After implementation Mr. McIntyre received calls from his members who were concerned about being monitored when not on the job. After receiving an opinion from counsel, Mr. McIntyre arrived at the view that Otis may be within its rights to monitor during working hours but not beyond. The calls that Mr. McIntyre received from members highlighted what he regarded as the change in practice regarding driving during non working hours. The drivers were concerned that if they stopped to attend to an errand on the way home from work they could be disciplined. Mr. McIntyre said he was unaware of employees being disciplined before for use of the company vehicle to and from work.

57. As a result of the concerns expressed to Mr. McIntyre, he arranged a telephone meeting with another union representative as well as Andrew Reistetter from the National Elevator and Escalator Association ("NEEA"), Bruce Ching, the Regional General Manager and Mr. Litteral. At that meeting Mr. McIntyre conveyed the concerns of the membership that they did not want to take the vehicles if they were being monitored after hours. The employer refused to concede on reasonable personal use of the vehicle to and from work, unless the employee was on call. No resolution was reached and the Telematics program was implemented by the company.

58. Mr. McIntyre detailed his concerns as regards the implementation of Telematics. He objects to the constant monitoring throughout the work day and into the hours when the employees are not being paid. He says that if an employee wants to visit an ill family member, has a doctor's appointment or wishes to watch a baseball game on the way home they should not have to tell their supervisor of this personal activity. He is concerned about what he terms the open-endedness of the information and who has control of it as well as concerns regarding privacy rights. Mr. McIntyre says that the members should not have to report what they are

doing after hours. Finally in Mr. McIntyre's view, the introduction of Telematics and the rules associated with it introduced a substantial change in practice. He notes the company's position as reflected in the PowerPoint material that the policy is not new, but Mr. McIntyre asserts that, if the "no personal use" policy always existed in writing, it was not enforced. There was no discipline issued other than for weekend use which the union concedes employees cannot do unless the employee is on call or the use is authorized.

59. Collective bargaining for a renewal collective agreement began in February 2010. The union tabled a proposal about employees being given a choice as to whether they wanted to be monitored off hours driving a company vehicle. The employer did not respond and the proposal did not result in any language on that issue in the renewal agreement.

The evidence of Local 96, the Ottawa Local

60. The disputes, positions and arguments of Local 96 are, in all material respects, those advanced by Local 50. There are some minor differences elaborated on by Ronald McNevin, the business representative of the local since 1998 and a person who has been in the trade since 1973.

61. Mr. McNevin described the breakdown of work performed by members of Local 96 and the large geographic scope of their work area. Many use company vehicles. Those who do not may walk to their job location or use personal vehicles. If they use personal vehicles that might require that parts be brought to them at the job.

62. In September 2009 Mr. McNevin also learned that Telematics would be introduced in his jurisdiction. He attended the same PowerPoint demonstration as Mr. McIntyre had in Toronto and was provided with the same information as to how the system would work and what information would be recorded.

63. Employees were provided with a memorandum from Mr. Charbonneau, the Ottawa branch manager. Employees asked questions about the use and monitoring of the vehicles and were concerned about the extent of the monitoring.

64. After the memorandum was issued employees expressed concern to Mr. McNevin about the change in working conditions.

65. On the issue of "no personal use" which was outlined in the material the employees received, Mr. McNevin says that the employees were told that this was not a concern in the Ottawa area and would be dealt with on a local level. His understanding from these comments was that the employees could use the vehicles in the same fashion as they had done in the past. Mr. McNevin took this to mean that personal use was acceptable as that had been his understanding to that point.

66. Mr. McNevin said that his understanding of the company's position changed when one of his members, James McCaffrey, was disciplined for using his vehicle to go to Tim Horton's on the weekend.

67. After the Telematics devices were installed in the vehicles in the Ottawa area, about half the employees who drove company vehicles decided not to take them home anymore. It is useful to distinguish the Ottawa and Toronto situation in one important respect. In Ottawa if an elevator mechanic chooses not to take a company vehicle home and agrees to pick it up at a designated parking spot close to his route, the routes are much closer to where the vehicles could be left and as such the inconvenience of the parking spot for the personal vehicle and the time required to arrive at the first job is reduced. Mr. Charbonneau said that there is a fenced parking lot at the back of the Otis office property with room for many cars. Most mechanics would have their first stop 15-20 minutes out of the office. In Toronto the designated spot may be farther although the company has said it will find a parking spot on or near the route or work station.

Mr. McCaffrey's Suspension

68. Mr. McCaffrey was a member of the Ottawa local working in the industry since 1970. He worked for Otis from 1970 to 1980 and again from 1983 to 2010.

69. Otis began to build up their fleet of vehicles in the 1980's and beginning in 1985, Mr. McCaffrey was provided with a company vehicle for his work. Most of the time Mr. McCaffrey worked as a service mechanic.

70. Mr. McCaffrey was not in town for the September 2009 meeting or PowerPoint presentation when the Telematics was introduced. He said he heard rumours that the vehicle use would be monitored, but he was still of the view that reasonable personal use was allowed provided it was not abused.

71. Prior to September 2009 Mr. McCaffrey used his company vehicle to drive to Tim Horton's on weekend mornings. On odd occasions he would have stopped as well to pick something else up. Additionally, he stopped to do small personal errands on the way home from work on weekdays. Mr. McCaffrey testified that he had full permission from his supervisor, Lloyd Peterson. That understanding began in 1985/86 and persisted until the incidents giving rise to his discipline. Mr. McCaffrey did not discuss the matter with subsequent managers.

72. When Mr. McCaffrey was referred to the document where "no personal use" is referenced, Mr. McCaffrey said that he had never received anything about this policy.

73. Mr. McCaffrey and the other employees are given 15 minutes of paid time to read the company's Health and Safety manual which requires an employee signature confirming it had been read. The document clearly makes reference to "no personal use" of the company vehicle. Mr. McCaffrey said after the first number of years he did not read it but just filled it indicating he had read it in order to obtain his time ticket. Mr. McCaffrey said that everyone used the company vehicles for reasonable personal use and that management knew of it. The company also

referred Mr. McCaffrey to a March 2009 and September 2009 memo provided to all employees about the personal use policy. When these documents were brought to his attention Mr. McCaffrey said that his managers knew what he was doing and he was not told otherwise after 25 years of his practice.

74. On the Thanksgiving weekend in 2009 Mr. McCaffrey took three or four trips out to purchase groceries for his family dinner. He said he logged about 2-2.5 kilometres. When he returned to work the week following, he was approached by Karim Shawaff, his manager, who advised Mr. McCaffrey that the company was aware that he had used his vehicle on the weekend. Mr. McCaffrey explained the use and it was his understanding that Mr. Shawaff accepted his explanation. Mr. Shawaff did not tell Mr. McCaffrey not to use the vehicle in that way.

75. In November 2009 Mr. McCaffrey was called into the office to participate in a conference call with Mr. Shawaff and Mr. Litteral. Mr. Litteral quoted the "no personal use" policy to Mr. McCaffrey and told him he was suspended for two days for personal use of the company vehicle. A suspension letter followed. Mr. McCaffrey was quite upset. The union grieved the suspension.

76. There is a reference in the suspension letter to Mr. McCaffrey being verbally warned not to make personal use of his vehicle. He disputes that this occurred. Mr. McCaffrey has never received discipline before and has been an exemplary employee in his years with Otis. He said that if he would have been warned of the consequences of driving the company vehicle on the weekend he would not have done so.

77. Mr. McCaffrey had another conversation with Messrs. Shawaff and Litteral after the suspension. During the conversation Mr. McCaffrey said that occasional personal use was permitted; a fact disputed by Mr. Litteral.

78. Mr. Litteral and Mr. McCaffrey have a slightly different version of the remainder of their conversation. Mr. McCaffrey recalls Mr. Litteral agreeing that Mr. McCaffrey could his vehicle for up to five (5) kilometres on weekends. Mr. McCaffrey said he continued to do so from that time in November 2009 until he left the company in July 2010. Mr. Litteral recalls telling Mr. McCaffrey that he would speak to the president of Otis Canada to see if a limited personal use amount could be arrived at but decided after this conversation that a fixed amount (i.e. 5 or 6 kilometres per day) would not work for the company.

Collective Agreement provisions

79. The collective agreement provisions referred to by the parties are Article 2.02, 2.03, 4.08, 7.02 [construction work], 8.06 [repair work] and 9.03 [maintenance work], 12.04.01 and 12.04.02:

...

2.02 The Union recognizes that it is the responsibility of the Employers, in the interest of the purchaser, the Employers and their employees, to maintain the highest degree of operating efficiency and to continue technical development to obtain better quality, reliability, and cost of its product, provided, however, that this provision is not intended to affect the work jurisdiction specified in Article 4 and Article 4(A), and the work jurisdiction as specified in other Articles of this Agreement.

2.03 Without limiting the generality of the foregoing, and subject to the other provisions of the Agreement, the Employers shall have the right to:

(a) Select personnel, hire, assign work duties, transfer, layoff and recall employees;
(b) discipline or discharge for just cause;
(c) establish and enforce reasonable rules of conduct to be observed by employees.

. . .

4.08 The industry, including its employees and customers, will be served best by full utilization of the latest methods, techniques, technologies, tools and equipment available including communications equipment. Therefore, no restrictions shall be imposed on their use.

. . .

7.02 It is agreed that the regular working day shall consist of eight (8) hours, between 8:00 a.m. and 5:00 p.m. five (5) days per week, Monday to Friday inclusive. The above hours of work may be changed for a particular construction job site to eight (8) hours between 7:00 a.m. and 4:00 p.m., five (5) days per week, Monday to Friday, inclusive, when the majority of the principal building trades as enumerated in Article 5 on a particular construction job do so, or as may be arranged with the Local Business Representative.

. . .

8.06 It is agreed that the regular working day shall consist of eight (8) consecutive hours, excluding meal breaks, between 7:00 a.m. and 6:00 p.m. five (5) days per week Monday to Friday, inclusive. All other working time shall be classed as overtime and paid for at double the rate of single time.

. . .

9.03 It is agreed the regular working day shall consist of eight (8) hours between 8:00 a.m. and 5:00 p.m. (5) days per week, Monday to Friday, inclusive. It is agreed that in order for call-backs to be answered in downtown business areas or similar business areas, an Employer may assign a Mechanic or Mechanics to remain at a mutually agreed building beyond regularly established working hours not to extend beyond 6:30

p.m. For all such work beyond his regularly established working hours, the Mechanic or Mechanics shall be paid at the rate of time and one-half. Should such assigned Mechanic or Mechanics be authorized to continue work on a job when a call-back extends beyond 6:30 p.m. he or they shall receive travel time and travel expense home. Where a holiday occurs, Monday through Friday, inclusive, the work performed on Saturday during the week in which any such holiday occurs shall be at time and one-half the single time rate.

…

9.08.05 Travel time from home to job and from job to home on an overtime call-back (starting after regular working hours and terminating before start of regular working hours) shall be paid for at the same overtime rate applying to the work. Travel expenses on an overtime call back shall be paid as agreed in Article 12.

When consecutive overtime call-backs occur, the employee shall receive the applicable overtime rate and travel expenses from home to job, from that job to one (1) or more other jobs and then back home.

An employee called out before the regular working hours, shall receive the applicable travel time and travel expense from home to job. (Exception: an Employer may call and instruct an employee to report to any given job at 8:00 a.m. on his route in the primary.)

…

12.04.01 TRANSPORTATION

The method of transportation from job to job during regular hours, overtime hours or travelling time authorized by the Employer, shall be that for which the Employer will accept responsibility and give monetary recognition. It is agreed that, when employees agree to use their personal vehicles for transportation as outlined in this provision, they shall be reimbursed in accordance with the applicable Revenue Canada Guidelines and Regulations.

The Employer shall also assume the cost of the difference between the employee's own standard insurance and necessary business insurance.

It is understood that there will be no geographical restrictions on the use of personal or company vehicles. Employees will not be required to carry material other than their own personal tools in their personal vehicles.

12.04.02

At no extra expense said vehicle shall be permitted to carry two (2) persons in addition to the driver, where all are going to the same

> destination, but no tools or materials which would normally be shipped by the Employer.
>
> It is also agreed that men shall not be required to use their own vehicles inside the primary jurisdiction, but there shall be no restrictions on the use of company owned or leased maintenance vehicles.
>
> Ownership of a personal auto shall not be a requirement of employment nor shall an employee be required to use his own vehicle if the employee objects.

. . .

Submissions of the parties

80. Local 50 says, as a starting point, that driving a company vehicle is voluntary. Second, it is of the view that an earlier Board decision in *Otis Canada Inc.*, [2009] O.L.R.D. No. 3673, has been interpreted by some of the membership as a requirement to accept a company vehicle and drive it to and from home. This is not the case. Third, it asserts the "no personal use" rule is by definition not reasonable as it does not allow for reasonable personal use. The word "reasonable" is in the law and the collective agreement. Local 50 contends that all that is required is an acknowledgement that 'reasonable personal use' is permitted; an acknowledgment that Otis refuses to provide.

81. Local 50 argues that there is no evidence to contradict that the rule is a significant change. It highlights that the employer has shown that on paper the "no personal use" rule has been there for several years, but the unchallenged evidence in respect of Local 50 is that reasonable personal use has been accepted.

82. This rule applies after and before work on an employee's personal time. As the locals contend and the employer agrees, it is not the employer's business. (This is subject to limited exceptions regarding activities engaged in by employees on non working time that impact the employer's legitimate business interests). In this case Local 50 highlights there are less intrusive means at Otis disposal to monitor the vehicles while respecting individual privacy. These are the use of the PDA or monitoring of vehicles by supervisors.

83. Local 50 argues that the system that Otis has set up requires disclosure of personal information in the event that an employee wishes to pursue after work activity such as attending a union meeting.

84. Local 50 argues that if I find the "no personal use" rule is reasonable, then the employees driving under the direction of the employer must be paid from job to home and home to job whether or not they are on call. And the union asserts that if employees choose to park the vehicles, they must be paid from the time they turn the vehicles on, and not, as the employer suggests only when they arrive at their first job.

85. Local 50 relies on the framework of the collective agreement. It begins that the parties should be attempting to jointly engage in a process of resolving issues regarding rules and working conditions. In turning to the recognition clause Local 50 recognizes the employer's rights under Article 2.02, but draws attention to and relies on Article 2.03 (c) and the reference to "reasonable rules of conduct". That must ordinarily mean conduct at work and not outside of work.

86. Reference was made to Article 4 and work jurisdiction which all relate to work performed by elevator constructors, but not on their time off.

87. Local 50 refers to the PDA device which is a cell phone with a connection to the Otis dispatch line. Local 50's view that the PDA is a communication device contemplated under section 4.08 and the Telematics device is not as it is a monitoring device; monitoring employees on a 24/7 basis. Such a monitoring device is not a communication device, nor is it a tool to maintain, install or service elevators.

88. Local 50 then relies on Articles 7.02, 8.06 and 9.03. These set out the hours of work for each of the construction, maintenance and repair workers respectively.

89. Finally Article 12.04.01 and 12.04.02 have relevance in that they speak of transportation issues and payment obligations of the employer and that employees are not required to use their own vehicles if the employee objects.

90. Local 50 advances the position that all monitoring must stop when the work day is finished and cannot begin again until the next shift. Further, members who choose not to take the company vehicles home must be paid from the time they pick up the company vehicle until the time they drop it off after work.

91. Local 50 contends that although the rules referred to by the company in the various exhibits provide for "no personal use", the practice and unchallenged evidence is that of allowance for reasonable personal use in both locals.

92. The union compares the Telematics rules with that of the PDAs and says they exhibit an interesting contrast. The PDA is logged on every morning and remains operational throughout the shift. It can be turned off at lunch and is logged off at the end of the shift. In the union's view there is a recognition and delineation between the use of the PDA as a work hour tool for monitoring with a direct understanding that the monitoring stops during personal time. In Local 50's view the PDA rules are recognition by the employer that is has no right to information regarding off duty activities.

93. Local 50 refers to the evidence of Mr. Fletcher who was with Otis for over 32 years. He says there were no restrictions on the use of the vehicle on the way to and from home. He understood that the vehicle should not be used after an employee arrives home and before they go back to work, with exception for on-call employees, but understood no other restriction en route to and from home. In his case if he needed to attend an educational program, given the

distance to and from his home after work, he would be unable to do so under the current structure. Mr. Fletcher says his supervisors knew the manner in which he used the company vehicle and were fine with it. Mr. Fletcher noted too that if he used the vehicles excessively there may be inquiries about his fuel consumption.

94. Local 50 asserts that when there is to be an intrusion on one's privacy, there has to be a balancing. If Otis has a financial interest in reducing the cost of its fleet there are ways of doing so without monitoring the off duty use of the vehicle. The union suggests that the employer could check the odometers in a shorter period of time than it takes Mr. Litteral to review the Telematics reports.

95. Local 50 summarizes its issue in this area as invasion of privacy, arbitrariness, and a change in the personal use policy. It asserts that to deny any reasonable personal use is itself unreasonable.

96. Local 50 says that the evidence from Mr. Litteral that the "no personal use" policy was always in practice is contradicted by the employees. Local 50 says that Mr. Litteral's grant of exceptions for "one off" personal use would not only require an unauthorized disclosure of personal information as to off duty activity but would not cover many legitimate situations such as weekly physiotherapy visits or visits to a sick relative on a regular and perhaps long term basis.

97. Local 50 says that the Otis evidence on how the vehicles are to be used is inconsistent. It points to Mr. Litteral's evidence that he would allow the use of the vehicle for educational purposes but not to attend a union meeting. Further Local 50 says that Otis takes the position that if you park your personal vehicle to pick up an Otis vehicle, you will not be paid from the parking spot to the location of your first job nor from the end of the shift to the location of your vehicle. The union emphasizes that an employee taking a company vehicle home has an advantage to Otis and in exchange for that advantage the employer should consider reasonable personal use.

98. Local 50 notes that Mr. Grubiso said that the monitoring from the Telematics may be capable of being turned off during off duty hours but that Mr. Litteral has not inquired about doing that.

99. Local 50 relies on jurisprudence and authority in support of its position. It begins with the proposition that the employer has no right to employee off duty information with two exceptions: where the parties have bargained it in the collective agreement and where the employer has demonstrated a legitimate interest. See *Brown & Beatty*, 7:3010: Off Duty Behaviour; *Kamasack (Town) and C.U.P.E., Local 1881 (Erhardt)* (2000), 89 L.A.C. (4th) 153; *Re Bell Canada and Communications Workers of Canada* (1984), 16 L.A.C. (3d) 397; *Re Cobourg & District Ambulance Service and Ontario Public Service Employees Union, Local 344* (1985) 21 L.A.C. (3d) 337. In the instant case, if the financial cost of a fleet is a legitimate financial and business interest, there has to be the same sort of balancing with the employee's privacy rights in terms of the method and type of monitoring. Local 50 says that the savings do

not warrant denying the employees some personal use and the employer should institute a less intrusive way to record and monitor mileage and gas consumption. Local 50 says there must be a balance of employee rights with employer rights.

100. Local 50 suggests an analogy with the case in *Schindler Elevator Corp. et al. v. International Union of Elevator Construction, Local 17* (Lurie, Arbitrator, February 27, 1999) where it was held that employees were not required to set up a communication device involving electrical and telephone lines in their own home as requested by the employer.

101. Local 50 says that the employer cannot require employees to take the company vehicle home but that if it does, then the direction is not voluntary and the employee must be paid. See *Re Province of Nova Scotia and Police Assn of Nova Scotia* (1993), 32 L.A.C. (4th) 47; *Re T.D. Chaisson Electric (1979) Ltd. and International Brotherhood of Electrical Workers, Local 625* (1980), 29 L.A.C. (2d) 268; and *Otis Elevator Co.* [1992] OLRB Rep. January 61.

102. While noting that employees are not comfortable with the Telematics and its monitoring functions, the union does not dispute the employer's right to use that technology during working hours. It does assert however that the use of the device on an off hours basis is a violation of the employee's privacy rights and does not contain the necessary balancing of interests. As to the "no personal use" rule, Local 50 relies on the fact that the rule was never enforced in the past and on Article 2.03(a) of the collective agreement for the proposition that it is not reasonable. It cites the *KVP Co. v. Lumber & Sawmill Workers' Union, Local 2537 (Veronneau Grievance)*, [1965] O.L.A.A. No. 2 and the requirements a rule must meet in order to be reasonable.

> **34** A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:
>
> 1. It must not be inconsistent with the collective agreement.
> 2. It must not be unreasonable.
> 3. It must be clear and unequivocal.
> 4. It must be brought to the attention of the employee affected before the company can act on it.
> 5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
> 6. Such rule should have been consistently enforced by the company from the time it was introduced.

103. Local 50 refers to privacy cases *Toronto Transit Commission and A.T.U. Loc. 113* (1999), 88 L.A.C. (4th) 109; *Labourers International Union of North America, Local 625 v*

Prestressed Systems (2005), 137 L.A.C. (4th) 193; *Cargill Foods, a Division of Cargill Ltd. v. UFCW, Loc 633* (2008), 175 L.A.C. (4th) 213; *Teamsters, Local 419 v. Securicor Cash Services* (2004), 125 L.A.C. (4th) 129; and *Re Corporation of the City of North York and CUPE, Loc. 94*, (1984) O.L.A.A. No. 108, specifically regarding how employers are required to consider less obtrusive measures of surveillance to accommodate their legitimate business interests.

104. Local 50 refers to the text, *The Law of Employee Monitoring in Canada* (Toronto: LexisNexis, 2009) and in particular the chapter dealing with location awareness technologies. The chapter focuses on GPS monitoring which tells an employer where exactly an employee is. While this fact situation does not require me to determine the parameters of use of a GPS system, I note that the test to be applied suggested demonstrable necessity, effectiveness in meeting the need, proportionality of loss of privacy with benefit gained and less invasive methods available. In applying these tests to the use of Telematics the union suggests that there is no valid or operational distinction between a GPS system and the Telematics as used by Otis, without GPS function. In Local 50's view the after hours monitoring is the essential and offensive element.

105. In summary, Local 50 says that a) Telematics is a significant change in the workplace; b) if I find it is justified, it must cease at the end of the shift, c) the "no personal use" rule is unreasonable and in violation of the collective agreement, d) the employees must not be obliged to take the company vehicles home and e) payments should be made for the time driving the company vehicle to and from the first and last jobs.

Local 96 Submissions

106. Local 96 adopts the submissions of Local 50 and highlights those areas where there are minor differences in the way the work is organized in Ottawa. In addition, Local 96 addresses Mr. McCaffrey's discipline.

107. It is significant from an operational perspective that the head office of Otis in Ottawa is easily accessible for any mechanic who wishes to leave their personal vehicle and that there is sufficient parking for them to do so. Although the impact of it may be less, Local 96 nonetheless adopts Local 50's view that where an employee is obliged to arrive at a destination other than his first job to pick up the company vehicle he should paid from the time they get into that company vehicle. Local 96 contends that the company position that payment will not be made until the mechanic arrives at the job site is in contravention of the collective agreement and the fundamental jurisprudence.

108. Local 96 says the evidence is unchallenged that there has been reasonable personal use since the introduction of the vehicles to the bargaining unit beginning in the mid 1980s. There was no change to that until the introduction of Telematics in the fall of 2009. The only evidence from Otis relating to Local 96 was from a former sales person, Mr. Charbonneau, who did not know the practices before he came. Even Mr. Litteral had no way of knowing how the parties had mutually interpreted provisions of the collective agreement and the policy and understanding regarding the use of the vehicles.

109. In applying then the uncontradicted evidence of a practice, in the context of Article 2.03(c), the parties' mutual agreement is that rules will be reasonable. That clause has informed the use of these vehicles from 1985 on. It was informed and accepted by the local area managers on Mr. McCaffrey's evidence. In that regard it is notable that there is very little difference in the experience of Mr. McCaffrey in the Ottawa local and Mr. Fletcher in the Toronto Local.

110. Despite what may be contained in the handbook, Mr. McCaffrey practice, understood by his area manager, was to engage in reasonable personal use on the way home, and, in his case on Saturday mornings. He interpreted the imposition of discipline as something that would arise if the use was unreasonable. Local 96 suggests it is not believable that the practice of reasonable personal use that existed in the face of a written prohibition on personal use, for in excess of 25 years and the company was surprised to learn of it upon the introduction of Telematics.

111. Local 96 emphasizes the advantage to the company of Mr. McCaffrey parking the company vehicle on his personal property and driving directly to his first work site with that vehicle. The *quid pro quo* for that and Mr. McCaffrey maintaining the vehicle and filling it with gas and oil, albeit at the employer's expense, was that he was permitted to use it on a reasonable basis. That interpretation never led to discipline for him or any other mechanic until the introduction of Telematics.

112. Local 96 relies on the fact that the introduction of Telematics is not a collective agreement protection but simply a policy. In its submission, the employer unilaterally introduced a new rule without consultation and negotiation and in the face of collective agreement language ensuring that such rules have to be reasonable (*KVP*, *supra*). Local 96 reviews the standard and says that the Telematics rule of "no personal use" fails on that standard. It argues that the rule is arbitrary and rigid and not reasonable as contemplated by Article 2.03(c) on any grammatical or labour relations reading. As such it should be held to be inconsistent with the collective agreement. The rule does not admit to any discretion, and it is therefore unreasonable. In Mr. McCaffrey's case it was not brought sufficiently to his attention as he was not at the meeting when the PowerPoint presentation was made. Finally Local 96 says that Mr. McCaffrey's managers knew and approved his reasonable personal use of the vehicle. It relies on the conversation between Mr. Shawaff and Mr. McCaffrey about the Thanksgiving weekend use. In November 2009, the incident that led to the suspension, Mr. McCaffrey was simply using the vehicle in the way he always had. His evidence was if he had been told not to, he would not have used the vehicle in the way he did.

113. Local 96 submits that the employer is trying to reassert the position in an old rule in the face of a practice which the employer is not willing to admit but which existed and was admittedly mutually understood. That practice was the employee's reasonable personal use of the vehicle in exchange for the employee taking the vehicle home. Local 96 asks the Board to confirm the reasonable personal use rule and resist the application of the rigid rule of "no personal use" made without consultation.

114. Local 96 relies on two additional cases to Local 50, *Miracle Food Mart* [1990], 17 L.A.C. (4th) 165 and the comments therein regarding the reasonableness of a rule in the face of a

mutually understood and agreed practice. Local 96 asserts that it is *prima facie* unreasonable to have a unilaterally imposed rule that removes the reasonableness of personal use. The practice supports the position that the rule is not reasonable. It relies too on *Farmers Co-operative Dairy Ltd. and C.E.P., Loc. 40-N (Re)* [2004] N.S.L.A.A. No. 32 133 L.A.C. (4th) 424, for the proposition that a proportionality test must be considered in the face of a business interest and a competing employee interest.

115. Local 96 asks that the union grievance as it relates to Mr. McCaffrey be allowed, his discipline removed and he be compensated for lost pay. His use was in compliance with the rule, the collective agreement and the established practice.

Submissions of Otis

116. The company begins its argument by emphasizing that Telematics does not monitor location but only indicates whether the vehicle is in use. Irrespective of the employer's view as to whether and how much it can monitor during working hours, it says that only the vehicle is monitored and not the individual worker. Otis highlights that it is not a traditional workplace with on site supervision. The elevator mechanics work autonomously. The employer asserts a general right to monitor the use and movement of its vehicles and the mechanic during working hours.

117. When turning to the issue of use outside of working hours, the employer asserts the right to control its asset – the vehicle. The employer allows the off duty use of the vehicle as a convenience to both the employee and the employer but restricts that use to and from work. The union says that there is a practice of "reasonable personal use" which the employer disputes although it recognizes that some after work and weekend use did occur from the evidence of Mr. Fletcher and Mr. McCaffrey. It was even then a restricted and limited use.

118. Although the company asserts the "no personal use" rule, Mr. Litteral identified what he looks at when reviewing the Telematics documentation. There is a prohibition on weekend use but there is also a general allowance for an hour or so after the work day ends to entitle the employee to some leeway on the drive home. When there are areas of concern, Mr. Litteral investigates and makes an individual determination. The company says that this is the application of discretion and renders the rule reasonable.

119. The company refers to the documentation of the rule since 1998 and notes that there has been no change to the prohibition against personal use of the company vehicle. The rule was reinforced with the PowerPoint presentation, the weekly readings and the health and safety manual. The company says the documents are consistent and longstanding.

120. All that occurred in respect of the rule with the introduction of Telematics was that the employer now had an enforcement mechanism. The employer is able to identify whether the vehicle is being used. In that regard the employer asserts there has not been a change and I have no jurisdiction in the context of a rights grievance to grant a reasonable personal use rule as the union suggests.

121. To the extent that the union frames an estoppel argument the employer suggest that is resolved in its favour in any event, as the issue was raised and abandoned at the last set of negotiations.

122. The employer reviewed the collective agreement provisions supportive of its position which include Article 2.02 and the specific reference to the "highest degree of operating efficiency." The employer says it is most efficient to take the vehicles home and directly to the work location. It is not efficient for the employees to take vehicles to the Otis site and, surely in Toronto, to then take them to the jobsite. Moreover Article 2.03 (c) of the collective agreement is relied on for the legitimacy of using Telematics and the fact that there is no restriction on the rule-making authority other than reasonableness.

123. It relies too on the introduction of technology provision found in Article 4.08 although the union responds that this article was not intended to apply to Telematics. The employer acknowledges that this article is directed at different kinds of equipment, but asserts the language is broad enough to apply to Telematics.

124. Although in the employer's view there is no need for an explanation for the employer to control its own asset, it says that it has provided a comprehensive reason for the rule. The application of privacy rules do not pertain because the employee has access to the employer's asset. The employee has no right to the asset other than as provided by the employer. It is a rule that limits the use and maintains the asset and its cost and life expectancy. Mr. Litteral agreed that what an employee does before and after work is not the company's business.

125. On the hours of work issue the company says that there is no breach of the hours of work provisions of the collective agreement. Given the hours in the agreement, the employer says it cannot be a breach of that agreement to require employees to report for work at 8:00 a.m. It contends further that Article 9 reflects the intent of the parties that employees should be on the job at 8:00 a.m. not picking up their vehicles at 8:00 a.m. This is further supported by the call back provisions in Article 9.08 and specifically Article 9.08.05 which stipulates when an employee is paid from home to job and back. This attracts overtime pay. The parties have turned their mind to that. In the company's argument, this reinforces the expectation that an employee is expected to be on the job at his starting time. Each of those articles commences at 8:00 a.m. and says 8 hours between 8:00 a.m. and 5:00 p.m. excluding meal breaks.

126. There are different provisions respecting employees moving around during the work day. The method of transportation is that for which the employer is responsible (see Article 12.04.01). So the employer decides how you go from job to job. The mode of transportation is clearly in the discretion of the employer.

127. In the company's submission, the employee is expected to be on the job at 8:00 a.m., whether or not the employee has a company vehicle. The only issue is whether he picks up the vehicle at the office or takes it home.

128. The company draws attention to the evidence from Mr. Litteral that in every instance where an employee has a company vehicle the employer is prepared to find a location to park at or near the work location. How the employee gets to that location is the employee's own issue. The company's position is that whether the employee chooses to take the vehicle home (other than call back) is voluntary, but the use of the vehicle on the job is not voluntary. The employer has the right to determine the method employees use to get from job to job.

129. As to the grievance concerning Mr. McCaffrey, the employer says that Mr. McCaffrey acknowledged receipt of documents about the "no personal use" rule that existed before the introduction of Telematics and that his explanations of the way he treated the various documents and information provided by the company on this issue was a case of wilful blindness. It does not excuse his non compliance. The employer took all reasonable steps to advise employees of the rule. However the company acknowledges that it has no contrary evidence to that of Mr. McCaffrey regarding his discussions with his supervisor in respect of the Thanksgiving weekend.

130. The employer provides case law involving this employer and the introduction of Telematics: see *International Union of Elevator Constructors, Local 125 v. Otis Canada Inc.*; Award of Arbitrator David J. MacDonald, Feb. 20, 2011 re Ralph Bonang (the "Nova Scotia Otis case"); Otis *Canada Inc. v. International Union of Elevator Constructors, Local 1;* Award of Arbitrator John Steeves, August 30, 2010 re: Telematics Device Policy Grievance, (the B.C. Otis case). In the Nova Scotia Otis case, Local 125 filed a grievance challenging a suspension levied against an employee who used the company vehicle for personal use. The material provided to employees in that case was the same as that provided in the PowerPoint presentation in this case. The grievor had driven the company vehicle on a weekend in contravention of the policy. The union in the Nova Scotia case agreed that the policy had been in effect for a long time, but said that it was not communicated to employees that breach of the rule would attract discipline. In the course of considering the propriety of the discipline the arbitrator reviewed the test set out in *KVP* and found that the collective agreement did not limit the employer's right to adopt a rule that prohibited personal use. The wording found in Article 2.02 of the instant collective agreement is substantially similar, if not identical, to the language in the collective agreement in the Nova Scotia case. The arbitrator there too found that the rule had existed for in excess of 20 years, but that monitoring of personal use only became effectively available to Otis with the introduction of Telematics. There are a number of findings that the employer relies on from this case. The first is found on page 8:

> In regard to this particular issue I find that the rule or policy prohibiting personal use of a vehicle is bona fide in that it advances legitimate business interests by more effectively managing fleet costs, that it satisfies the *KVP* requisites, and that Mr. Bonang, was in violation of that rule when he operated the company vehicle on December 5th and 6th, 2009, thereby attracting a disciplinary response.

131. The second is in finding that the two-day suspension was warranted on the following basis:

> … It is evident that the Employer has chosen to treat inappropriate use of a company vehicle as a serious offense, that is their prerogative. When one considers the reduction in fleet costs that occurred after the Employer had a tool to measure inappropriate use, it is understandable that they would take such an approach and choose to send a clear message in regard thereto. There should have been no doubt after the November advisory to employees that the Company was now drawing a *'line in the sand'* with respect to improper use of company vehicles and from the point on November 17th – would be taking appropriate disciplinary action **up to and including discharge**. There should have been no misunderstanding about this advisory type warning and a two-day suspension is certainly within the range of discipline indicated. Accordingly, in these circumstances, I find that the two-day suspension was appropriate. This grievance is dismissed.

132. The B.C. Otis case is slightly more complicated in its application to this case in that it engages an analysis of the privacy legislation in that province. That case was a policy grievance where the local union objected to the use of Telematics as an intrusion on employee privacy and a violation of certain provisions of the provincial labour legislation. Again the Telematics was not GPS enabled. On the use of Telematics, the grievance was denied.

133. In terms of the general propositions on the balancing of employer interests with the employee's right to privacy the company relies on the decisions in *Natrel,* [2008] O.L.R.D. No. 4736; *Canada Safeway Ltd.* [2005] A.G.A.A. No. 109 145 L.A.C. (4th) 1. These cases deal respectively with biometric timekeeping devices. The company suggests that these cases deal with more intrusive methods than the Telematics and in both cases the employer's right to use the devices was upheld. The company relies on the cases to argue that the balancing further favours its position. The minor intrusion of the company knowing if the vehicle is in use on off duty time is outweighed, in the employer's view, by the employer's right to know how its asset is being used.

134. The company addresses one example of use presented by the union. If an employee wants to attend a union meeting after work he is obliged to tell the employer that he will do so and obtain permission since the use of the vehicle will be recorded. The union's position is that intrudes on the employee's privacy. The employer says that the employee can leave the company vehicle on site and use his own vehicle or obtain a ride to the meeting and thereby not tell the employer where he is going or he can choose to keep the company vehicle for convenience and obtain permission. In the company's view this is not onerous or intrusive. The union responds that any explanation that an employee may be required to give about off duty conduct is not the employer's business. The balance must be one that weighs the importance of privacy during non working hours.

135. Finally, the union responds that reasonable personal use must be the rule and that the employer is not entitled to make inquiry within that confine. The union says this is a major change in working conditions and unjustified.

Analysis and Decision

136. I deal first with the installation of the Telematics devices. The original grievances did reference that issue and Local 50 suggested that PDA's are a better option to determine work status at a job site.

137. It is clear from Article 4.08 of the collective agreement that the employer has the ability to utilize new technology to improve service to its customers. That in my view includes the use of Telematics and in that regard the provision in 4.08 spells out that " .. no restrictions shall be imposed on their use." The jurisprudence supports the view that the installation of the Telematics is acceptable.

138. The employer can install these devices in the company vehicles and has done so for legitimate reasons of efficiency and economy. The employer does not monitor location but only if the vehicle is in use. The employer has made it clear throughout that an employee is not required to drive the company vehicles when not on company time. The employer is prepared to make the necessary arrangements to have vehicles available for pick up and drop off for those employees who do not wish to drive the company vehicles on the employee's own time.

139. I deal with the remainder of the issues as the following:

> a) Can the employer monitor if its vehicles are in use when they are driven by employees on off duty hours?
>
> b) Is the "No Personal Use" of the company vehicle a new rule and if so is it a reasonable rule?
>
> c) if an employee chooses not to drive the company vehicle home, must they be paid from the time they pick up the company vehicle at the designated spot or does payment begin when they arrive at the first job location. Similarly are they then paid from the time they leave the last job location or when they drop off the vehicle at the end of the shift?
>
> c) did the employer have just cause to discipline Mr. McCaffrey and if so was a two-day suspension justified?

140. There is little dispute that the driver and Otis mutually benefit when employees agree to drive vehicles home. The driver does not have to pay for their commute to and from work. Otis does not have to pay to have its trucks parked nor to arrange for drivers to obtain and leave trucks at different locations on the route. To both parties' advantage, all the parts and tools are readily accessible on the job without the necessity of waiting time and another truck being dispatched. The mechanics go directly to and from home to work. There is no wasted time in leaving a personal vehicle and obtaining a company vehicle. The employee does not pay for gas, insurance or repairs for that portion of the time they are commuting. I adopt the conclusions from the B.C. Otis case in respect of the purpose of the introduction of Telematics in paragraph 112 which is "primarily aimed at the efficiency of the fleet of company vehicles" and at paragraph 103 that the changes brought about by the introduction of Telematics are not a

significant change to the terms and conditions of employment. Those considerations are an important context in which to assess these grievances.

141. The employer can install Telematics in its vehicles. The vehicles are the asset of Otis. They are for the use of the Otis employees to enable the work of the employer to be performed. The union's suggestion that the employer use another system for monitoring use such as the PDA or the vehicle's odometer or gas consumption, either is not germane to what the employer is permitted to do. The issue is whether the employer is precluded from using the Telematics device not whether some other device, is adequate to the purpose. The suggestion that the Telematics be turned off during off hours is not a solution given that part of the purpose is to ensure no off duty use of the company vehicles, except with approval.

a) Can the employer monitor if its vehicles are in use when they are driven by employees on off duty hours?

142. The answer to this question is yes. The company is entitled to monitor when its vehicles are being used. However, equally as important a principle is the employee's right to privacy on his/her off duty hours. The employer has no right to know where an employee goes after or before work and to what purpose. There are of course limited exceptions in the jurisprudence to this, but none of those are relevant to this determination.

143. The difficulty that arises is when an employee chooses to use the company vehicle to and from home for the practical reasons listed above and the Telematics records the vehicle's use. This situation calls into play two competing interests: One is the employee's right to privacy during off duty hours and the other is the employer's entitlement to control and monitor the use of its asset.

144. I can find no contractual or other reason to restrict the company from the ability to monitor its vehicle use at all times. The employer is responsible and indeed liable for that vehicle at all times. It is liable for its use and pays for its gas and maintenance. The Telematics device is a legitimate way to protect the employer's asset; an asset for which it has full responsibly given the options that the employer has provided to employee and discussed below, the restriction on the use of the vehicle during off duty hours is justified.

b) Is the "No Personal Use" of the company vehicle a new rule and if so is it a reasonable rule?

145. There was some dispute as to the whether the "no personal use" policy was a new policy or an existing one. There is no dispute that the employer is able to much more effectively enforce it with the introduction of Telematics. Having heard the evidence and reviewed the documents that contained the rule, it was not a strictly enforced rule. That was because the ability to do so was limited before the introduction of Telematics, and it may be that different supervisors and district managers enforced the rule in varying ways. Whatever the reason, the "no personal use" rule was not consistently or completely enforced or complied with until September 2009 with the introduction of Telematics. There was no accurate means for the employer to assess the precise use. The strict enforcement of the rule against personal use after

work hours was done on reasonable notice to the union and the employees. The notice of the new enforcement meant that the union could not longer rely on the prior inconsistent application of the rule. It is appropriate to assess the reasonableness of the "no personal use" rule in the context of its application in September 2009 and forward.

146. The union says that a rule that says "no personal use" of the company vehicle during off duty hours cannot be reasonable and that reasonable personal use, as the union suggests, cannot be excluded. In addressing that test I do not find the rule to be unreasonable given that the use of the Company's asset after hours is optional. If the employee chooses not to take the vehicle, as they can do, there is no monitoring. Otherwise the employee can take the vehicle home and back, or to other venues with permission, and knows that the employer is aware of when the vehicle is in use. There is no collective agreement provision other than the one about new technologies that specifically addresses this dispute. There is clearly no specific collective agreement prohibition on the "no personal use" policy or its application given that the employee has a choice as to whether to use the company vehicle after hours. As to the clarity and communication of the rule, to the extent that there may have been inconsistent application of the rule both the PowerPoint presentation and the clear communication to the employees were unmistakable as to what the rule was with respect to personal after hours use of the company vehicle. The union locals suggest that there must be discretion in order for a rule to be reasonable. That is a different issue than clarity of the rule, and I find that the rule and the fact of its enforcement were made clear to employees when Telematics were introduced in September 2009.

147. Additionally, there is some reasonable discretion afforded. Mr. Litteral does not approach an investigation of after hours use without affording some leeway in terms of time after the end of the shift. The company has established a system to provide permission for use outside of these parameters. The union says an employee should not have to seek that permission and thereby be required to disclose his/her off duty use. It is absolutely true that an employee need not be required to disclose his off duty activity but if they choose not to then they cannot use the company vehicle on personal time. That is a fair balance of competing interests. An employee can either obtain permission for the use of the company vehicle which permission requires a disclosure of where the vehicle will be and when and for how long or he/she can leave the vehicle and provide no explanation to the employer at all. The employee's privacy rights are in that way fully protected.

148. The PowerPoint presentation and the meetings with employees both brought home the fact that discipline would result from unauthorized use. Finally the rule must be consistently applied. The company documents and evidence of Mr. Litteral's approach to the Telematics records he reviews every week suggest that enforcement will be consistent.

149. In short I am of the view that the "no personal use" rule withstands the test of reasonableness. The asset belongs to the employer and it is its to monitor and control. The Telematics only provides information as to how long the way the vehicle is operated; when it starts and stops. Moreover the reasonableness of the rule is completely established by the option for the employee not to take the vehicle to and from home at all.

c) if an employee chooses not to drive the company vehicle home, must they be paid from the time they pick up the company vehicle at the designated spot or does payment begin when they arrive at the first job location. Similarly are they then paid from the time they leave the last job location or when they drop off the vehicle at the end of the shift?

150. The parties are agreed that many employees need to use a company vehicle to do their work during the day. For those employees who choose then not to take the company vehicles home at night, this presents a logistical as well as a timing problem. Basically they are required to make one extra stop on the way to and from work. As part of the enforcement of this rule the company has provided that the vehicle to be collected before work and left after work will be either on the employee's route to the first job site, or near the first job site. If this condition is met, then the interruption for the employee in getting to work is minimal. The hours of work prescribed in the collective agreement are not altered by whether or not one additional stop is made before arriving at or leaving the worksite.

151. With this proviso as part of the rule, and the vehicles not taken home will be parked on the employee's route to the first job, or in close proximity to the first job, there is no meaningful deviation from the employee's direct route to their first job of the day, there is no violation of the collective agreement by insisting that employees be at the work site at the times specified in the collective agreement and leaving at those times. Subject to this qualification, the manner in which they get to and from work is not additional paid time. The drive to and from work has not previously been paid time.

d) Did the employer have just cause to discipline Mr. McCaffrey and if so was a two-day suspension justified?

153. Mr. McCaffrey's evidence was clear and undisputed. He had used the company vehicle for occasional weekend use for many years and with the knowledge of different supervisors. Although he did not attend the Telematics presentation, he did receive the PowerPoint material which clearly notes "no personal use". However, Mr. McCaffrey's discussions with his supervisor, Mr. Shawaff, led him to believe that he could continue to use the vehicle as he had. Mr. McCaffrey clearly and convincingly said that if Mr. Shawaff had told him not to use the vehicle on the weekend as he had been doing, he would not have done so. There is nothing to contradict his evidence. Mr. McCaffrey has an excellent employment record. I distinguish this case from the Nova Scotia Otis case in that the grievor in that case was not given any contradictory assurances by management as Mr. McCaffrey had been in the instant case.

154. Given Mr. McCaffrey's understanding for many years coupled with the discussions with his supervisor, I am persuaded that Mr. McCaffrey's breach of the rule was inadvertent and his discipline excessive. He should have been provided with a clear written warning on the Thanksgiving occasion complete with what would occur if he breached the "no personal use" rule again. Given that did not occur, his two-day suspension is not justified and his grievance is allowed. The grievance is allowed. Mr. McCaffrey's discipline is reduced to a written warning and he is to be compensated for time lost due to his suspension from work.

155. Finally the union has requested that this decision note that employees are not required to take company vehicles to and from home.

1946-12-U Richard Brock, President, on behalf of the members of The Halton Elementary Unit of the Ontario English Catholic Teachers Association (O.E.C.T.A), Applicant v. The Ontario English Catholic Teachers Association (O.E.C.T.A.), Responding Party v. Halton Catholic District School Board, Intervenor.
2014-12-U Concerned group of OECTA member teachers, Applicant v. Ontario English Catholic Teachers' Association, Responding Party.

2305-12-U Kent MacNeill, on his own behalf, and on behalf of The Individual Members of the Ontario English Catholic Teachers Association, Sudbury Elementary Bargaining Unit, Applicant v. Ontario English Catholic Teachers Association, Provincial Executive, Responding Party v. Sudbury Catholic District School Board, Intervenor.

2409-12-U Liz Stuart, Kerry Dupuis, Heather Manasses, Filomena Ferraro, Mike Totten, Edna diFalco, Greg Bolton, Pat Chiarella, Luna Ciccone, Eric Longbotham, on behalf of all members of the York Unit of the Ontario English Catholic Teachers Association and Elaine McMahon, Beth Dowe, Sally Enright, Patricia Stack, Mark McCormick, Carol LoMascolo, Julie Guevremont, Kay Stephen, Wendy MacPhee-Ebbs, Mary Mahor, Michelle Coutellier, Mara Torcaso, on behalf of all the members of the Ottawa Unit of the Ontario English Catholic Teachers Association, Applicants v. Ontario English Catholic Teachers Association, Responding Party v. York Catholic District School Board and Canadian Union of Public Employees, Intervenors.

Duty of Fair Representation – Ratification and Strike Vote – These applications alleged violations of the Act arising out of the round of teacher bargaining in Ontario, described in an earlier Board decision (R v. OSSTF 2012 CanLII 80016), resulting in the MOUs that were negotiated between the Government and OECTA – The applicants allege that OECTA has violated its constitutional provisions and by-laws by, among other matters, failing: to communicate with its members; to obtain proper authorization for bargaining; to abide by systemic bargaining objectives; to abide by the authorizing resolution of the Council of Presidents – OECTA brought a motion that there was no labour relations purpose to proceed given that the Putting Students First Act did not permit the relief sought and that all these matters were essentially internal union affairs where the appropriate recourse was political, not legal before the Board – The Board reiterated its longstanding jurisprudence which makes it clear that s. 74 explicitly deals with "representation of the employees in the unit" – The Board found that the upcoming elections in OECTA, where virtually all of the leadership responsible for the MOU will be challenged, was the appropriate place for the wisdom of these choices made by the OECTA leadership to be measured—not under the guise of an application of fair representation – The Board noted that the nature of political arrangements OECTA reaches with the Government of Ontario as a mature stakeholder in the education sector are not matters

that this Board is either qualified to or should intervene in, question or regulate – The forum for addressing the extent to which OECTA's constitution or by-laws have been violated is the courts, not the Board, and finally an allegation under s. 44 requires ratification of a collective agreement and the MOU was not an agreement with one of the Catholic school boards, but rather an agreement with the government – Matters dismissed

BEFORE: Bernard Fishbein, Chair.

APPEARANCES: *Andrea Bowker, Liz Stuart, Heather Manassis, Elaine McMahon* and *Richard Brock* on behalf of York Unit of OECTA; *John Cafferky, Sheila MacMillan, Luigi Martelli* and *Pamela Spearns* for the Concerned group of OECTA member teachers; *Bruce Sevigny* and *Kent MacNeill* (on his own behalf) on behalf of The Individual Members of the Ontario English Catholic Teachers Association, Sudbury Elementary Bargaining Unit; *Bernard Hanson, Paul Cavalluzzo* and *Marshall Jarvis* for OECTA; *P. Adrian DiLullo* for York Catholic District School Board and Sudbury Catholic School Board; *P. Adrian DiLullo, Joe O'Hara* and *Laura Frees* for the Halton Catholic District School Board; *Gavin Leeb, Elizabeth Nurse* and *Brian Blakeley* for Canadian Union of Public Employees.

DECISION OF THE BOARD: February 26, 2013

1. These are several applications alleging violations of section 74 and 44 of the *Labour Relations Act, 1995, S.O. 1995*, c.1, as amended (the "Act") arising out of the recent round of the teacher bargaining in Ontario.

2. In particular, these applications relate to the Ontario English Catholic Teachers Association ('OECTA") entering into a Memorandum of Understanding ("MOU") with the provincial Government on July 5, 2012.

3. At the outset I should note that the Canadian Union of Public Employees ("CUPE") intervened on the first day of hearing (without objection from any party) but withdrew its intervention prior to the second day of hearing. Equally, at the outset, because these applications raised questions about the *Putting Students First Act*, 2012 S.O. 2012 c. 11, (hereinafter either the "*Putting Students First Act*" or "*Bill 115*") and no formal notice was given to the Minister of Education or the Attorney General, counsel for OECTA indicated that he had been advised that neither sought to intervene at this time. Everyone was content to proceed on that basis. In view of the disposition of the *Bill 115* issues below, it did not really matter.

Background

4. I have previously described the context of teacher collective bargaining in Ontario at some length in a recent decision arising out of these same circumstances in *Crown in Right of Ontario, the Honourable Mr. Dalton McGuinty, Premier of Ontario et. al.* (OLRB File No. 0134-12-U), R v Ontario Secondary School Teachers' Federation, 2012 CanLII 80016 (ON LRB) ("the *McGuinty* decision"):

5. Teachers' collective bargaining in Ontario is governed by Part X.1 of the *Education Act* R.S.O. 1990 c.E.2 ("the *Education Act*"). In many ways, it imposes a unique system of collective bargaining for teachers in the public education system ... The *Education Act* creates mandatory bargaining units for all district school boards and statutorily designates the exclusive bargaining agents for all of those bargaining units. For purposes of this case, the OSSTF is the bargaining agent for each of the secondary school teachers' units at all English-language public school boards, ETFO is for the elementary school teachers' units at English-language public district school boards [Similarly, OECTA is the statutory bargaining unit for all teachers employed by the Catholic District school boards throughout the Province of Ontario]. Collective agreements between district school boards and statutory bargaining agents must be for a term of either two or four years and commence on September 1st of the year in which the previous collective agreement expired. As well, section 277.2(3) of the *Education Act* specifically provides no person is entitled to make an application to the Ontario Labour Relations Board under section 1(4) of the *Labour Relations Act, 1995* with respect to a school board. The *Education Act* quite clearly envisages that for collective agreement purposes, the employers of teachers are the district school boards (see also section 171(1)3 of the *Education Act*).

6. Section 277.2(1) of the *Education Act* provides that the *Labour Relations Act* applies with necessary modifications with respect to the district school boards, designated bargaining agents and Part X.1 teachers except as otherwise provided or required by Part X.1 of the *Education Act*.

7. Notwithstanding the model in the *Education Act* of collective agreements between district school boards and the designated statutory bargaining agents, commencing at least with the bargaining in 2004, the Government initiated a process whereby discussions took place at a provincial level with various statutory bargaining agents (which since the previous *Education Act* amendments were now the provincial bodies) and the provincial school board trustees associations (such as OPSBA [Ontario Public School Boards Association] and OCSTA [Ontario Catholic Schools Trustees' Association]) which resulted in "framework" agreements or Memorandums of Agreement or Understanding (hereinafter either "MOA" or "MOU") between those parties (which to the extent that the framework agreements or MOAs went, were used subsequently or formed the basis for the actual collective agreements between the bargaining agents and the district school boards as contemplated and required under the *Education Act*). This process was referred to as the Provincial Discussion Table ("PDT"). Participation in the PDT was completely voluntary. In fact, OSSTF itself apparently refused to participate as early as the 2004 round. The PDT process existed outside of the statutory framework of the *Education Act* or the *Labour Relations Act* for that matter. In fact, the individual district school boards were not even participants in the PDT process – only the trustee associations.

8. In fact, it is probably significant to note at this point the limited submissions of OPSBA and OCSTA. Aside from confirming the view that

the PDT was purely voluntary and outside both the *Labour Relations Act* and the *Education Act*, they point out that membership in their respective associations is not statutorily required and is purely voluntary (and from time to time certain school boards are actually not members). Neither has the authority or capability to either collectively bargain on behalf of or bind individual school boards – although they certainly can and do give advice and make recommendations to individual school boards.

9. PDT discussions successfully produced framework agreements in 2008 involving, among others, OSSTF, ETFO and CUPE [and OECTA]. Unfortunately, the discussions in 2012 were not so successful. The Government found itself in serious financial difficulties and since education is a significant part of the provincial budget, not surprisingly, wished to limit its expenditures in that sector and wished to utilize the PDT process to hopefully obtain agreement (or at least acquiescence) to those objectives. It produced and tabled for the PDT discussions, a document titled the "Government of Ontario Parameters for the 2012 PDT" that set out the Government's expectations for the collective agreements results it wished in the educational sector (or the Government's fiscal parameters in the education sector, as it would characterize it). Among other things, the Government wished the unions to agree to a wage and grid freeze and changes to the ability to bank and "cash out" sick leave credits upon retirement. Although by the time of the hearings, the Government had reached agreements with OECTA and the Association (and they withdrew from this complaint), the discussions between the OSSTF and the intervenors at their PDTs did not go as well. It is the conduct of the Government with respect to these PDT discussions that formed the basis of this complaint…

27. ETFO complains that the Government's actions at this round of the PDT are unprecedented – and it is the Crown that is acting without any legislative authority whatsoever. But no one disputes that the PDT process (in every round that it has occurred) has operated outside of the ambit of either the *Education Act* or the *Labour Relations Act*. Perhaps that is a criticism that is well-founded – that the Government ought to have filled the legislative gaps in which the PDT has operated and evolved (and part of the *Putting Students First Act* deals with study and possible implementation of provincial bargaining in the *Education Act*), but that is for elsewhere…

28. Regardless of any parties' view of the merits of the PDT process, or regardless of any parties' view of the heavy-handedness of the Government's position in the PDT process, no one disputed that it was voluntary. Both the Association and OECTA had initially opposed the Government's position in the PDT process but ultimately reached a framework agreement and withdrew their intervention in this complaint. That is certainly the view of both OPSBA and OCSTA, the alleged "employer" presence in the PDT process (and they both explicitly denied that they could or did represent or bind the relevant school boards in the process – the real employers of Part X.1 teachers – and I cannot help but observe that notwithstanding the passion with which the unions argued that the Government had superseded and rendered local

bargaining useless and usurped the role of the district school boards, not a single school board intervened in this complaint to voice the same complaint). In fact, both ETFO and the OSSTF withdrew from the PDT process at different times. Ultimately so did OCSTA (and never signed the OECTA MOU). They were free to do so. The result was the introduction and enactment of the *Putting Students First Act* which the Government had repeatedly stated was its legislative alternative (or threat) – which OSSTF repeatedly pointed out in the complaint…

48. ... OSSTF argues that the benefit the Crown seeks to achieve is as acting as employer or on behalf of employers it seeks to obtain economically beneficial collective agreements. However, even with the successfully-concluded Memorandums of Agreements or framework agreements with OECTA and the Association, the results are still not collective agreements between the district school boards and the trade unions (the statutory designated bargaining agents) required under the *Education Act*. These still have to happen…

56. Moreover, the PDT was a voluntary system. Perhaps it may be a little too precious to call the Government's role in these PDT discussions as merely "facilitating" discussions. However, if OSSTF, ETFO and CUPE did not wish to reach agreement (or be "facilitated") on these matters in this way (as OECTA and the Association chose to do), they were free to leave the PDT – which they did. In fact so did OCSTA notwithstanding that OECTA concluded a MOU. Then failing to voluntarily (albeit with a "legislative" gun to OSSTF's and the others' heads) reach agreement, as the unions conceded it was entitled to do (subject to their legislative challenges elsewhere), the Government was free to legislate the outcome it wished – as it said it would all along and which it now has…

59. ... Again, without repeating myself unduly, this ignores that the PDT process was voluntary – OSSTF could and did withdraw from the process. The Government's PDT parameters certainly did wish to control collective bargaining outcomes – a wage and grid freeze and changes to the ability to bank and cash out sick leave credits upon retirement at a minimum. The Government does not resile from this allegation… And that assumes that the PDT was not a voluntary process (again, albeit, arguably a blunt and heavy-handed process) but some binding process that actually compelled this result – as opposed to the *Putting Students First Act* which is what may actually legally compel the result. As the Government argued, and as recorded in *Brant Haldimand-Norfolk, supra,* the PDT process, although perhaps more intrusive this time, is no different in principle than the Government's previous intrusions (as Government funder, regulator, policy-maker) into educational sector collective bargaining issues – e.g. class size, teacher complement etc., whether in previous PDTs or not…

63. The complaint alleges violations of sections 17, 70, 72, 73 and 76 of the *Labour Relations Act*. In order for there to be violations of these sections of the *Labour Relations Act,* the Crown would have to be an employer or acting

> on behalf of an employer – See the previously quoted portion of the *Ontario (Premier)*, decision, *supra*, at para. 163:
>
> > 163. I might begin by observing that the focus of the legislation is on the collective bargaining relationship between *employers* and *employees* (see the "Purposes" of the Act stipulated in section 2). The Act is designed to facilitate such relationships, and prevent employers from using their superior economic power to frustrate the process of collective bargaining, or penalize mployees who choose to join a trade union. The Act does not regulate the independent actions of third parties, however "anti-union" those actions might be. The third parties must be directly linked in some way to *an employer* or to some *employer-employee relationship*, and the third party must be acting *on behalf of the employer* to accomplish an improper end.
>
> The Crown is not the employer here. The *Education Act* makes it clear that the district school boards are the employers of Part X.1 teachers. I do not believe that the unions seriously question that (or did not seriously argue to the contrary at the hearings).
>
> 64. Leaving aside, as I have repeatedly stated throughout, that the complaint fundamentally mischaracterizes the PDT process as collective bargaining or its equivalent [it is voluntary and even if successful and with these complainants and the Government it was not – still requires the negotiation (albeit on a very constrained basis) and conclusion of collective agreements with the actual employer], the district school boards, the actual employers, were not even present. Both trustee associations who were present (at least at the outset) are not the employer either. In fact, they specifically deny (and it is not disputed) that they cannot compel the district school boards to even belong, let alone commit or bind them. In fact, even though OECTA ultimately did reach and sign a MOU, not only did the OCSTA not sign, but quit the PDT process. Neither the OPSBA nor the OCSTA regard the PDT process as collective bargaining or governed by section 17 of the *Labour Relations Act*…

5. These present applications arise out of the MOU that was actually negotiated with OECTA (unlike the other teacher associations, primarily OSSTF and ETFO, which were either unwilling or unable to conclude an MOU with the Government).

6. OECTA's governance structure primarily consists of a Provincial Executive (which is elected and is responsible for administering the affairs of OECTA between its annual general meetings) together with a Council of Presidents comprised of, among others, the Provincial Executive and all unit presidents for every OECTA unit in Ontario. The applicants are members (and in some cases the Executive) of a number of units of OECTA (the Ottawa, York, Halton and Sudbury Units) and some other members from other units. They are opposed to OECTA having entered into the MOU and the manner and process by which it did so.

7. There is no dispute that at a meeting on December 14, 2011 the Council of Presidents "endorsed" the Provincial Executive entering into the PDT discussions. There is no dispute the Provincial Executive ratified the MOU on July 5, 2012 and presented the MOU to a meeting of the Council of Presidents held on July 10, 2012. There is no dispute that the Council Presidents passed a motion "endorsing" the MOU at that time.

8. However, the applicants made a series of allegations that OECTA has violated many of its constitutional provisions and bylaws in this course of conduct – which, they say, has resulted in OECTA violating section 74 of the Act by:

> (a) failing to communicate with its members contrary to the policies and by-laws of OECTA while representing it would;
>
> (b) failing to obtain the proper authorization for bargaining in which they engaged, contrary to the policies and by-laws of OECTA while representing it would,
>
> (c) failing to abide by the systemic bargaining objectives of OECTA as set out in its policies and by-laws while representing it would;
>
> (d) failing to abide by the authorizing resolution of the Council of Presidents while representing it would;
>
> (e) usurping the bargaining authority of local units, contrary to the bylaws and policies of OECTA while representing it would not and
>
> (f) stripping local collective agreements even beyond what the Government sought in its desired economic parameters while representing that it would not.

Counsel for some of the applicants characterized these as "procedural" violations of the duty of fair representation – what there can be no dispute about is that they relate to the very internal workings of OECTA in how it dealt with the PDT discussions.

9. As well the Halton group points to the loss of its "death gratuity" which was "sacrificed" in the MOU allegedly without any of that unit's knowledge or authorization. Equally, the Sudbury group points to the loss of its "post-retirement benefits" in the MOU. Of course, all of this was done **without a ratification vote of the MOU**, which some of the applicants assert was required by section 44 and 79 of the Act. Based on these alleged violations the Applicants seek various remedies from the Board, but essentially declarations that the MOU is null and void, restoration of various terms and conditions from the predecessor collective agreements and compensation for their losses.

10. OECTA brought a preliminary motion that this case be dismissed without a hearing as it did not make out a *prima facie* case for the relief requested, essentially on the basis that:

(a) in view of the provisions of the *Putting Students First Act* or *Bill 115*, the Board had no jurisdiction to grant the relief sought with respect to the MOU and therefore there was no labour relations purpose served in proceeding with these applications and

(b) the complaints were essentially matters of internal union affairs where the appropriate recourse of the applicants was political within OECTA and not legally before the Board.

11. By decision dated October 22, 2012, the Board directed an oral hearing to deal with the preliminary objections by OECTA. Hearings were held on November 23, 2012 and February 5, 2013 to deal solely with OECTA's preliminary objections.

Test for *prima facie* case motion

12. The test for whether an applicant has pleaded a *prima facie* case is well known and has been described in many decisions of the Board. See for example – *The Corporation of the County of Brant*, [2000] OLRB Rep. Nov/Dec 1106, at page. 1108:

> "... a responding party that seeks to have the Board dismiss an application before the hearing on the grounds that the application fails to set out a *prima facie* case for a violation of the Act must satisfy the Board that there is no reasonable likelihood that the applicant can establish a violation of the Act based on the allegations it has made in its application, or in the words of the Supreme Court of Canada, that it is "plain and obvious" that the allegations in the application do not disclose a violation of the Act."

See also *Canada Safeway Ltd.*, [2002] OLRB Rep. July/August 670 at paragraph 8, *Read*, 2003 OLRD No. 1878 at paragraphs 2-4, *A&P Canada Co.*, [2007] O.L.R.D. No. 4519 at paragraphs 3 and 4.

13. No party disputed this test. In determining whether to dismiss an application for failing to make it a *prima facie* case, the Board must only have regard to the allegations (not conclusions) made in the application and must accept those allegations as fact (and assume them capable of proving unless obviously otherwise). Having said that, the Board is not precluded from also referring to facts that are clearly not in dispute, even if for whatever reason they have been omitted from the application (see *John Kohut*, [1991] OLRB Rep. January 35 at paragraph 12).

Relevant Statutory Provisions

14. Sections 44 and 74 of the Act provide:

> 44. (1) A proposed **collective agreement** that is entered into or memorandum of settlement that is concluded on or after the day on which this

> section comes into force has no effect until it is ratified as described in subsection (3). …
>
> …
>
> 74. A trade union or council of trade unions, so long as it continues to be **entitled to represent employees in a bargaining unit**, shall not act in a manner that is arbitrary, discriminatory or in bad faith **in the representation of any of the employees in the unit**, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.
>
> (emphasis added)

Analysis and Discussion

(a) The *Putting Students First Act* (*Bill 115*)

15. At the time that the hearing commenced, *Bill 115* had been passed and was in force. Section 15 (3) provided:

> "(3) Terms and conditions included in a collective agreement under or by virtue of this Act shall not be questioned or reviewed by an arbitrator, an arbitration board or the Ontario Labour Relations Board, except as provided by those terms or conditions."

16. Much of OECTA's argument was directed at the fact that the relief that the applicants sought was precluded (and explicitly beyond the jurisdiction of the Board) pursuant to this provision of *Bill 115*.

17. However, by the time the hearing resumed on February 5, 2013, the *Putting Students First Act* had been repealed. Accordingly, section 15 (3) was no longer in force and the applicants therefore contended that I need give no consideration to the *Putting Students First Act* or OECTA's arguments with respect to it. However OECTA argued that the provisions of the *Legislation Act* and in particular section 51(1):

> 51. (1) The repeal of an Act or the revocation of a regulation does not,
>
> …
>
> (b) affect a right, privilege, obligation or liability that came into existence under the repealed or revoked Act or regulation;
>
> …
>
> (d) affect an investigation, proceeding or remedy in respect of,
>
> (i) a right, privilege, obligation or liability described in clause (b), or
> (ii) a penalty, forfeiture or punishment described in clause (c)."

preserved OECTA's rights or privileges. In particular, OECTA asserted that if the argument on its preliminary motion had been completed on November 23, 2012, the Board clearly would not have jurisdiction to deal with the MOU and the fact that the hearing did not conclude but continued on a later date ought to be of no legal significance. In particular, OECTA submitted that the *Legislation Act* preserved its rights, including a right that the MOU would be immune from review by a Board or an arbitrator for the length of the restraint period created by *Bill 115* (or the length of the collective agreement). OECTA pointed me to the decision in *Sisulak Ontario (Ministry of Community Safety and Correctional Services)*, [2011] O.J. No. 1009, where the Divisional Court dismissed the judicial review application of a decision of the Public Service Grievance Board which had determined that it had no jurisdiction – because the applicant did not have 12 months employment on the date of his dismissal, the statutory eligibility criterion for review of the dismissal, even though by the date of the hearing that statutory eligibility criterion had been eliminated. OECTA pointed me to paragraphs 40-42 of that decision where the Divisional Court stated:

> "40. As I have discussed earlier, the question before the Board, and now this Court, is clearly one of jurisdiction. Thus, the new statutory and regulatory provisions that change the jurisdiction of the tribunal do not affect this case. The former provisions, that defined the tribunal's jurisdiction at the time of dismissal, govern the case.
>
> 41. This conclusion is not altered, in my view, by s. 52 of the *Legislation Act*, 2006. Section 52 of the *Legislation Act*, 2006 does not stand alone. It must be considered as part of the Act as a whole, and must be interpreted in conjunction with s. 51.
>
> 42. Section 51 of the *Legislation Act*, 2006 clearly protects vested substantive rights. Specifically, it states that the repeal of an Act or the revocation of a Regulation does not "affect a right, privilege, obligation, or liability that came into existence under the repealed or revoked Act or regulation". In this case, the employer had the vested right to dismiss an employee without challenge by the employee, unless the employee had twelve months' service with the Crown."

In view of my conclusions below, I need not answer this question or resolve this portion of the dispute.

(b) Is this an internal union matter beyond the reach of section 74 of the Act?

18. The prohibition or constraint on trade union conduct in section 74 explicitly deals with the "representation of the employees in the unit" It is important to state this at the outset. Not all trade union conduct is regulated by the *Labour Relations Act* or within the purview of the Board. That is why the Board has determined that issues that do not relate to the representation of an employee *vis-à-vis* his/her employer are not circumscribed by section 74 – for example, representation of members before the Workers Compensation Appeals Tribunal (now the

Workers Safety Insurance Appeal Tribunal), see *Luis Lopez*, [1989] OLRB Rep. May 464, or representation with respect to the *Occupational Health and Safety Act* (see "*Chubb Security Systems") Villella v. IBEW Local 636,* 2001 CanLII 14772 (ON LRB). This has been explained by clarifying that the duty of fair representation is "co-extensive" with the exclusive bargaining agency status of the union or "commensurate with the reach of the union's statutory authority to represent the employees in the bargaining unit" In *Lopez*, this Board referred to the same approach being adopted in British Columbia in *Registered Psychiatric Nurses Association of British Columbia*, [1980] 1 Canadian LRBR 441, where the British Columbia Labour Relations Board refused to find that a refusal to represent a member at a coroner's inquest was within the reach of British Columbia's statutory duty of fair representation:

> "The inquest was not a proceeding under the collective agreement; it was an outside proceeding. Where Section 7(1) speaks to "representation", it must be taken to mean representation in the negotiation or administration of collective agreements. Disciplinary matters and grievances come within the purview of the duty. Inquests do not. It is not enough that the outcome of the inquest might influence Morgan's employment rights. The same could be said of criminal charges, theft from an employer for example. While Section 7(1) would require fair representation of an employee discharged as a result of such a theft, it would not require the union to represent him in criminal court. A union may choose to provide representation to its member at outside proceedings such as inquests or criminal proceedings arising out of incidents during strikes, but their failure to do so is not a matter which may be a breach of the duty of fair representation."

For a similar conclusion in Ontario on that very same question, see *John Kohut* [1991] OLRB Rep. January 35 at paragraphs 15-16.

19. Similarly, in *Chubb Security Systems*, this Board plainly put it at paragraph 10:

> 10. The Board has also determined that a trade union's duty of fair representation is restricted to the union's representation of **employees in the bargaining unit in their dealings with their employer.** Section 74 does not regulate trade union organizations or what might be described as "internal trade union affairs"
>
> 11. Matters such as qualifications for membership, the rights of members vis-à-vis the union or each other, elections, union meetings, **the powers of union officers, general decision-making processes of the union, and so on,** are not regulated by the *Labour Relations Act, 1995* at all. It is the union's constitution that governs the internal workings of the organization. A union member who claims that the union constitution has not been applied, or that his or her rights as a member have been infringed, may pursue any dispute settlement mechanism provided in the constitution and, if necessary, apply

> to the courts for further relief. A union member's complaint that the union has not properly applied the union constitution is not the subject matter of a section 74 complaint.
>
> (emphasis added)

20. As well see also *Sarnia Construction Association*, [2004] OLRB Rep. March/April 407 at paragraphs 65-66:

> 65. Section 74 is in fact a codification of what courts in the United States (*Vaca v. Sipes* 64 LRRM 2369 (SCUS)) and Canada (*Fisher v. Pemberton* (1969) 8 D.L.R. (3d) 521 (B.C.S.C.); *Canadian Merchant Service Guild v. Gagnon* [1984] 1 SCR 509) have found to be a common law duty of fair representation. The duty arises from the exclusive nature of the Union's right to represent employees in their relations with an employer. The Act deprives the employee of the right (such as it is) to bargain terms and conditions of employment and gives that right and duty exclusively to the Union. That exclusivity carries with it a duty of fair representation.
>
> 66. However, section 74, like the common law duty, does not extend beyond the confines of that exclusive representational relationship. It covers many things the negotiation of a collective agreement, the day-to-day administration of a collective agreement, including the processing of grievances. The Act has in section 75 extended the duty to the operation of hiring halls. The section does not extend into other activities of the union such as voluntary assistance given to members in their dealings with public agencies (e.g., WSIB, EI, Immigration,), matters of internal organization that are not related to the relationship with the employer (elections for office, the conduct of union meetings, and so on). None of these fall within a union's exclusive representational authority.

21. These cases or these comments are by no means exhaustive on this point. To the same effect is the oft quoted decision of the Board in *Frank Manoni,* [1981] OLRB Rep. December 1775:

> 11. This precise point was dealt with by the Board in *Arthur Joseph Roberts v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 48*, [1974] OLRB Rep. Mar. 169, in which the complainant, an elected business agent of the Local, complained that he was arbitrarily removed from office. The Board stated, at paragraph 8:
>
> > "...the duty of fair representation owed by a trade union to an employee under section 60 (now section 68) [now section 74] of the Act does not contemplate controlling the manner in which a trade union conducts its affairs with its elected officials whether they be on the payroll or not. The case law indicates that the propriety of a trade union's behaviour vis à vis its members is governed by its constitution and by-laws

> > and the procedural remedies provided therein. And recourse must be made by an aggrieved member of the governing rules provided under the constitution for relief. The safeguard provided by the controlling supervision of the courts are his assurance that these rules will be implemented fairly and impartially. (See *White v Kuzych* (1951), A.C. 585; *Lee v Showmans Guild* (1952), All. E.R. 1175; *Orchard v Tunney* 1957 CanLII 57 (SCC), (1957), S.C.R. 436; 8 D.L.R. 273; *Jurak et al v Cunningham* (No. I) (1959), 20 D.L.R. (2d) 377; *Jurak et al v Cunningham* (No. 2) (1959), 20 D.L.R. (2d) 381; *Gee v Freeman et al reflex*, (1958), 26 W.W.R. 546)."
>
> The Board went on to hold, at paragraph 20, that "under section 60 a trade union's duty of fair representation does not extend to members in good standing who are not employees in a bargaining unit". To a similar effect, see *Gale Douglas Devereaux*, [1975] OLRB Rep. Nov. 885, at paragraph 9. It should be added that even if brought by persons currently employed in a bargaining unit (and the complainants claim to "represent" a number of such persons), the present complaint still would be misconceived under section 68. The arbitrary, discriminatory or bad faith conduct directed at such employees and regulated by the section must be such as to produce actual, and not merely speculative prejudice to those employees *at the hands of their employer…*
>
> 18. From the point of view of the Labour Board, however, all of this depends upon a complaint making out a *prima facie* violation of the *Labour Relations Act*. **The Board does not enjoy the inherent jurisdiction of the Courts; it derives its jurisdiction from the statute which created it. As the Board noted in *Mario Moreira*, [1980] OLRB Rep. July 1039, "this Board has no specific authority under the Act to undertake any sort of watchdog role over a union's internal processes under its constitution and by-laws". To the extent that a complaint relies simply upon allegations of a trade union's constitution being violated, without more, it is not the function of the Board to intervene (again see *A. I. Roberts*, [sic] [1974] OLRB Rep. March 169**; and for the supervisory authority of the Courts in such matters, see *Howard v. Parrinton* (1971), 3 O.R. 659). Where, however, a violation of a specific section of the *Labour Relations Act* is involved, different considerations arise.
>
> 24. **The Board wishes to emphasize once again that it does not consider it to be its mandate or function to act as a "watchdog" over a trade union's constitution, or to monitor irregularities in internal trade union procedure. Ample recourse is available in that regard through other forums…**
>
> (emphasis added)

See also *Thomas Park* OLRB File No. 0115-10-U at para. 31 Park v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 385, 2010 CanLII 60784 (ON LRB) *Bonnee Chapman et al*, OLRB File No. 0583-08-U at paragraphs

11-14 Chapman v. Canadian Union of Public Employees Local 1880, 2008 CanLII 44304 (ON LRB)

22. I do not mean to suggest that the Board will never look into whether union bylaws or constitutions have been violated. The applicants in particular point me to the Board's decision in *Corporation of City of Thunder Bay,* [1983] OLRB Reports May 781, where the Board dismissed complaints that a union negotiating a compressed wage grid that lowered some bargaining unit members' wages violated the duty of fair representation but upheld the complaints that the manner in which it was done did violate that duty of fair representation – in particular the way the negotiating committee was restructured contrary to the union's constitutions and bylaws:

> 86. It is one thing for the wishes of a minority to be overridden by the openly expressed will of the majority, and entirely another to have their wishes suppressed by the deliberate manipulation of a committee's membership contrary to the union's by-laws. The by-laws and constitution of a union, which are essential elements to trade union status under the Act, are the charter by which the employees in a union may know and enforce their rights. In this case the evidence leads the Board to conclude that the by-law was departed from by the executive committee for the express purpose of limiting the access of the complainant group of employees to any meaningful voice in the bargaining committee. We must conclude that the means adopted constitute unfair suppression of the interests of a minority of employees contrary to the Act.

But that case was in the context of a union negotiating a collective agreement with its employer – something indisputably within the scope of section 74. What the cases make clear is that an alleged violation of the union's constitution and by-laws is in and itself not a violation of the Act – let alone section 74. It is not a free standing complaint that comes within the jurisdiction of the Board. If it is connected and related to some other alleged violation of the Act, the Board may consider the alleged violation of the union's constitution or by-laws to the extent it is helpful, relevant or probative to those other alleged violations of the Act. That is ultimately what happened in *Manoni, supra* – some evidence of conduct allegedly contrary to the union's constitution and bylaws was heard, not with respect to a violation of the duty of fair representation, but with respect to allegations of intimidation contrary to what is now section 76 of the Act (See *Manoni, supra,* at paragraphs 23 and 24). In these applications, the question is whether there is anything within the scope of section 74 (as there are no other sections of the Act that are alleged to be contravened other than section 44) that these alleged violations of OECTA's constitution and bylaws can be probative of or relevant to?

23. The applicants have pointed me to a number of Board decisions for the proposition that the duty of fair representation applies, at least presently in Ontario, to the negotiation of a collective agreement and not just its administration (*c.f.* the different provisions in the *Canada Labour Code*). I do not disagree with that.

24. The applicants have also referred me to many Board decisions for the proposition that a failure to properly communicate with members of the bargaining unit both with respect to the

administration of the collective agreement (i.e. the processing of individual grievances) or the negotiating of a collective agreement may constitute a violation of the duty of fair representation under section 74 of the Act. See Hawker Industries Ltd. [1976] OLRB Rep. January 967; *Diamond "Z" Assn.* [1975] OLRB Rep. October 791; *Interior Systems Contractors Association of Ontario,* [1995] OLRB Rep. August 1082; *Mackie Automotive Systems (Whitby),* [1998] OLRB Rep. March/April 246; *Cuddy Food Products Ltd.,* [1988] OLRB Rep. December 1211. Again, I have no disagreement with this proposition – but these are all cases that deal with communication about collective bargaining between the union and the actual employer of the members of the bargaining unit.

25. As OECTA pointed out to me, the Board has previously recognized, for section 74 purposes, limitations on even those duties to communicate (or ratify) in situations that do not properly or precisely fall within the context of actually negotiating a collective agreement with the employer (for example amending an existing collective agreement mid-term, see *Loblaws Supermarkets Ltd.,* [2003] OLRB Rep. November/December 990, or negotiating a revised draft collective agreement with a potential purchaser of a business, see *Great Atlantic & Pacific Tea Company Limited,* [1986] OLRB Rep. April 485 at paragraph 56).

26. The question remains whether the PDT process and the negotiation of a MOU is the negotiation of the collective agreement with the employer of the members of the bargaining unit. I believe that these applications fundamentally misconceive and mischaracterize the PDT process as collective bargaining or its equivalent. As was repeatedly made clear in *the McGuinty* decision, *supra,* it is not.

27. Whatever the impact of the MOU, alone and standing by itself, it did not create a collective agreement as observed in the quotes from *the McGuinty* decision, *supra.* No one has alleged or advised me whether the collective agreements which imposed the terms of the MOU on these applicants were freely negotiated between OECTA and the relevant Catholic District School Boards, or imposed by *Bill 115* itself. However, the subject of attack of these applications is only the MOU and OECTA's conduct in negotiating it, so it does not really matter. The complaints are not about the actual "collective agreements" binding upon the relevant Catholic District School Boards and the applicants (whether they were freely negotiated or not – and likely they were not – or rather imposed pursuant to *Bill 115* – a combination of the Minister of Education making recommendations to the Lieutenant Governor in Council and the Lieutenant Governor in Council by regulation imposing the collective agreement pursuant to sections 8 and 9 of *Bill 115* – all of which was done by January 2, 2013). In other words, it is the collective agreements that were either freely negotiated (unlikely) or imposed by *Bill 115* (more likely) that have taken away any specific terms and conditions of work that the applicants complain about – not necessarily the MOU – or put another way the MOU alone was legally incomplete and insufficient to take away or alter those terms and conditions of work. For that to happen, it required a collective agreement with an employer – a Catholic District School Board – whether negotiated freely or imposed by *Bill 115.* However OECTA's conduct may be characterized, it is not OECTA that caused the enactment of *Bill 115* or can be held accountable for it – no matter how distasteful it may be to the applicants.

28. What the applicants complain about is the conduct of OECTA in reaching its accommodation reflected in the MOU with the Government. They say it violates the constitution and bylaws of OECTA and attacks OECTA's core values. Whether that is an accurate characterization or not, the Board has repeatedly stated that it is not a "watchdog for internal union affairs" It is not for the Board to enforce the constitution and bylaws of any particular union. There are other forums in which that can be done. Unlike the unique provisions for trade unions in the construction industry (see for example sections 147 to 149 of the Act which explicitly give the Board authority and jurisdiction to do this in certain circumstances); section 74 has no such reach.

29. The applicants argue that I need not interpret the words "representation of any of the employees in the unit" so narrowly. Leaving aside that would be contrary to all of the relevant Board jurisprudence to date, I am simply not persuaded.

30. The applicants say that OECTA was engaged in negotiations with the Government of Ontario only because of its exclusive bargaining agency status. That is not self evident. In fact, at least initially, all the relevant trustee associations were at the PDT tables, notwithstanding they had no representational authority or could bind employers (see *McGuinty*, *supra*, at paragraphs 7, 8, 28, 59, 63, 64). In fact, OCSTA, the Catholic trustee association left the PDT table before the OECTA MOU was reached. Moreover, whatever the value the Government saw in reaching an MOU with OECTA (it obviously did not or could not with ETFO and OSSTF); it is difficult to say that dealing with the Government is "coextensive" with a union's exclusive bargaining agency status. Unlike bargaining with an employer for a collective agreement or pursuing a grievance to arbitration, where bargaining unit members are exclusively in the hands of the union, bargaining unit members can independently have access and make representations to government, just like they could to WSIAT, or file an OHSA complaint. Whether they will actually be effective, or the government will listen, may depend on a variety of factors – but they are not legally "shut out" – they are not "exclusively" in the hands of the union.

31. The applicants say that the MOU sets forth all types of obligations on employers and employees and contemplated changes in terms and working conditions. The applicants say that OECTA intended the MOU to be a collective agreement with the employer. That may be true but it does not alter the fact that the MOU itself was not a collective agreement. It required either the subsequent execution of a collective agreement with a District School Board or the imposition of the collective agreement under Bill 115. The test cannot simply be that the conduct of a union will affect terms and conditions of employment because, in the words of the *British Columbia Board in Registered Psychiatric Nurses Association, supra,* the mere fact that the results of a criminal trial may affect the bargaining unit member's employment rights is not enough to require the statutory duty of fair representation to apply to the criminal trial – or require the union to represent the member at the criminal trial (with counsel or otherwise).

32. As this is a *prima facie* case motion, I cannot and will not make any judgment about the various defences asserted by OECTA for its conduct and choices. Whether it was a union balancing various competing interests and making difficult choices in difficult times (see *Dufferin Aggregates Ltd.*, [1982] OLRB Rep. January 35, or *Surelink London Division*, OLRB

File No. 0415-99-U Barrieau v. Teamsters. Chauffeurs, Warehousemen and Helpers, Local Union No. 141, 2000 CanLII 12192 (ON LRB) decision dated March 23, 2000 at paragraph 12 – in which case the Board tries not to "second guess" trade unions even when the impact of such decisions can be as dramatic as the loss of employment), as OECTA would characterize its conduct in dealing with the Government in the PDT process, or whether it would have been wiser to simply walk away from the PDT table like other teacher associations did, as the applicants appear to suggest, I need not decide at this particular point in time. What is indisputable is that the MOU was the result of negotiations with the Government – not employers. To bind the employers – the Catholic District School Boards – required the Government to do more – the *Putting Students First Act*.

33. This is not a technical or illusory distinction. "Collective Agreement" is a defined statutory term in the *Labour Relations Act*:

> "collective agreement" means an agreement in writing between **an employer** or an **employers' organization**, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers' organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees, ..."
>
> (emphasis added)

34. I refer again to those cases at paragraph 25 *supra*, that OECTA pointed me to where the obligation to communicate (and ratify) as part of the duty of fair representation did not cover those situations which were not exactly negotiating a collective agreement (*Loblaws*, *supra*, *A&P*, *supra*). But more importantly, fundamental to being a collective agreement is that it be between an employer and a trade union. Whatever the MOU is – social contract, how OECTA might choose to characterize it, "sell-out", as some of the applicants might choose to characterize it, or whatever – it is not with the applicants' employers, but with the Government of Ontario. To put it starkly, if OECTA as a stakeholder was invited to or involved in consultations with the Government about amendments to the *Labour Relations Act,* the *Education Act* or any applicable piece of legislation (which no doubt also could dramatically affect terms and conditions of employment of teachers – See those sections or regulations under the *Education Act* that deal with mandatory teachers' duties just by way of example) – is that interaction with the Government subject to the reach of the Board in section 74? I do not think so.

35. I recognize that when public activities are involved, and the Government is a primary or exclusive funder of an employer, the edges of this distinction may become a little blurred – but without digressing into issues of justiciability (see the *McGuinty* decision, *supra*) dealing with the Government as government is qualitatively different than dealing with an employer. To put the hypothetical example into a more private sector context, if the Teamsters Union came to some agreement with the Government of Ontario about legislative changes to drivers licences that could very well affect many of its driver members, I do not believe that the Teamsters Union's conduct would be subject to scrutiny by the Board under section 74 of the Act.

36. The applicants say the fact that OECTA was dealing with the Government in concluding the MOU and not their actual employer should not be fatal to these applications. They point me to *Great Lakes Forest Products Limited*, [1979] OLRB Report July 651 at paragraphs 43-46 where a breach of the duty of fair representation was found even though the union's conduct dealt only with its internal affairs (i.e. failure to admit some individuals to membership):

> 43. The remaining question is whether there has been a contravention of section 60 [now section 74] of the Act.
>
> 44. Section 60 sets out the legal limitations imposed on a trade union in its representation of employees in the bargaining unit. The immediate question which arises is to define what is encompassed in "representation". On its face, representation involves acting on behalf of employees in dealings with the employer. Hence, the most usual complaints which arise out of the representational process are those which are grievance-founded complaints over rights derivative of the collective agreement or bargaining process complaints relative to the impact on individual employees of the general terms and conditions of employment bargained for the total bargaining unit. In both types of cases, the bargaining agent which has been granted exclusivity to deal with the employer on behalf of all employees must often transcend the particular interests of individual members of the unit in the interest of arriving at a collective position which can be supported in negotiations with the employer. So long as this process of integrating the individual interests into a collective viewpoint takes place without arbitrary, bad faith or discriminatory treatment of any individuals in the bargaining unit, it is accordance with the bargaining agent's statutory obligations.
>
> 45. **The question here is whether the representational responsibilities of the exclusive bargaining agent extend beyond servicing an employee's interest in a perceived complaint against employer treatment. In our view, the representational function includes the total process by which the employment interests of individual employees are reconciled and integrated into a collective whole by the bargaining agent, and section 60 of the Act prescribes the outer limits to the manner in which this process may be exercised.**
>
> 46. It is clear in this case that Gain and Smith had no action or non-action of the employer about which they would seek to complain and have corrected. Their complaint, if any, must be that they were precluded from performing the work assigned them by their employer by the actions of the respondent, and in the ultimate were forced by the circumstances created by the respondent to abandon their employment relationship. In our view the complainants had a right to expect that their employment interests would be protected by the respondent and would only be modified to the extent necessary to achieve a legitimate collective goal and then only in a manner which was not arbitrary, discriminatory or in bad faith. The evidence is that the respondent took a number of steps including resort to an unlawful strike to accomplish the

> demise of the complainants' employment relationship and this, surely, can only be characterized as the antithesis of protecting the complainants' employment interests.
>
> (emphasis added)

Although I agree with the result in *Great Lakes Forest* (however it was reached), and leaving aside that it considerably predates later Board jurisprudence about limitations on the scope of a trade union's duty of fair representation (see for example *Luis Lopez*, supra, *Chubb Security*, supra), it involves facts wildly dissimilar from these applications. In *Great Lakes Forest*, the union was one of five at the same location and refused to accept into membership two employees who were transferred into their bargaining unit to commence an apprenticeship from another bargaining unit (as was contemplated by the collective agreement and consistent with prior practice) because while in the other bargaining unit they (like hundreds of other employees) had crossed the union's picket line. Ultimately the Board concluded that however the "collective" goals that were being pursued to the detriment of the individual complainants were characterized; they were not valid or legitimate:

> 47. It is many times necessary for a bargaining agent to forego advancing the interests of individual employees in the short or long-term interests of the collective whole. It seems to us that if the respondent was here acting for the achievement of any collective interests, such interests can only be identified as being to create a general awareness that the respondent was strongly opposed to persons crossing its picket line, or alternatively, that the respondent was seeking the collective good by using the complainants' employment as a lever with the company to halt what the respondent viewed as job erosion within its unit.
>
> 48. In respect to the former objective which, in effect, is founded on an objection to the complainants' fulfillment of legal obligations to honour their own collective agreement, it is not in our view a permissible collective objective. In respect to the alternative objective relating to job erosion, the respondent had both contract arbitration and a provision in the contract for the settlement of jurisdictional disputes which were available to them and which could have been pursued in place of destroying the complainants' employment interests.
>
> 49. In our view, collective objectives of the above type cannot be considered as valid or relevant factors in integrating the complainants' employment interests with the interests of those of the collective whole. Decisions which are based on irrelevant facts or principles are arbitrary within the meaning of section 60 and we therefore find that the respondent has contravened section 60 of the Act.

37. What however is incontrovertible is that the dealing of the union (internal or otherwise) in *Great Lakes Forest* involved its relationship with the employer of the complainants while the complainants were in the bargaining unit for whom the union was the exclusive

bargaining agent – it did not involve a third party – let alone the Government of Ontario. The applicants point me to no case in Ontario or elsewhere where that is the type of union activity that is sought to be constrained or proscribed pursuant to section 74 or its equivalent. They say however that I should not "put my head in the sand" – whether with the Government, or anyone, regardless of whether their employer or not, when representing employees in any bargaining unit, the union must act in "total convergence" with its rights and obligations or in the words of *Great Lakes*:

> "the total process by which the employment interests of individual employees are reconciled and integrated into a collective whole by the bargaining agent"

I am not persuaded either that the result in *Great Lakes*, or the intent or reach of the statute in section 74 goes as far as the applicants assert.

38. I also note that were I to accept the MOU as the collective agreement or its equivalent, which employer (Catholic District School Board) and which bargaining unit does it apply to? Presumably the applicants are compelled to say all School Boards and all bargaining units. But relief is sought by only members of a handful of the bargaining units – relief which would nevertheless affect all of the bargaining units. That is precisely why the *Education Act* creates a regime of individual collective agreements with individual employers – and why section 74 addresses representation in a "bargaining unit" – so these kinds of questions will not arise.

39. I accept the characterization of this type of activity or conduct by OECTA made by its counsel. Counsel for OECTA urged me to borrow from the analogy of the Supreme Court of Canada in *Weber v. Ontario Hydro*, [1995] 2 SCR 929 (in determining whether a dispute really belonged in the grievance arbitration process before an arbitrator or in the courts before a judge) and to look at the essential character of the dispute. In these applications the essential character of the dispute was not a representational one as that is understood and defined by section 74 of the Act and the jurisprudence, but really an internal political one about choices made by OECTA. These are choices made by the democratically elected leadership of a trade union. If trade unions are to be truly mature and responsible participants (dare I say "partners") in the workplace and modern society, and the explicitly stated purposes of the *Labour Relations Act* appear to envisage that they are, these are the kinds of choices left to the membership of the trade union through its own internally devised structures and procedures and not subject to oversight, regulation and "second guessing" by any governmental agency including the Ontario Labour Relations Board – at least certainly not without the most explicit statutory authority – which section 74 neither appears to have nor has ever been interpreted to reach.

40. No one disputed that there are upcoming elections in OECTA where virtually all of the leadership responsible for the MOU will be challenged. That is the appropriate place for the wisdom of these choices made by the OECTA leadership to be measured – not under the guise of an application of fair representation pursuant to section 74 of the Act. Leaving aside whether OECTA's conduct can be said to be arbitrary, discriminatory or in bad faith (a decision I do not make here), the nature of political arrangements it reaches with the Government of Ontario as a mature stakeholder in the education sector are not matters that this Board is either qualified to or

should intervene in, question or regulate. This kind of accountability to OECTA's membership is best determined through OECTA's own internal democratic procedures.

41. Again, to the extent that OECTA's constitution or bylaws have been violated (and again I make no decision about that), the forum for such disputes has never been the Ontario Labour Relations Board. The forum for such disputes is the courts. In a time of limited public resources, where this Board is stretched to the limit, the Board ought not to "stretch" its limited statutory jurisdiction under section 74 – a jurisdiction limited, in my view, not only by the clear wording of the statute but by the clear Board case law – to venture into an area never ventured into before – particularly where to me at least, the membership of OECTA is as well, if not better, placed to pass judgment on the political decisions made by OECTA in dealing with the Government of Ontario.

42. Similarly, section 44 of the Act contemplates a ratification of a "collective agreement" Without unduly repeating myself, whatever the legal status of the MOU, it is not a collective agreement. It is that MOU which the applicants seek to have put to a ratification vote – not any subsequent collective agreement binding on them and the relevant Catholic District School Board – whether freely bargained or imposed by *Bill 115*. On the plain reading of the statute, section 44 reaches only collective agreements. Again, as I have mentioned previously (and OECTA pointed out to me) the Board has previously recognized such limitations and held section 44 and ratification does not apply, for example, to mid-term amendments of collective agreements (see *Loblaws Supermarkets Ltd., supra* – and there is also no breach of section 74 by failing to hold such a ratification vote). If there is an obligation at all to ratify something like the MOU, it must come from elsewhere. If it in fact comes from the constitution and bylaws of OECTA (and again I make no decision about that), that is a violation that is remedied elsewhere.

Conclusion

43. Accordingly for the reasons outlined above, even if all the facts alleged in the applications are true, these applications do not make out any possible violations of the

Labour Relations Act and are therefore dismissed.

3076-10-R The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Applicant v. **RioCan Real Estate Investment Trust, Retrocom Mid-Market Reit, Highway 93 Property Holdings Inc.**, Responding Parties.

Natural Justice – Sale of Business – The Carpenters sought a declaration that RioCan had sold part of its business to RetroCom – Beginning in 1999, the Carpenters and RioCan were involved in lengthy litigation at the Board regarding a sale of properties from Burnac to RioCan – During the course of that litigation, in 2005, RioCan agreed to sell certain properties to RetroCom – When the original dispute involving the Carpenters and RioCan was concluded (2010), the union wrote to RetroCom, grieving that the latter was in

violation of the Provincial Collective Agreement – RetroCom claimed that this was the first time it learned of any allegation that it was bound to the Carpenters' agreement (five years after it had purchased the property) – RetroCom moved for dismissal of the current application, claiming a denial of natural justice because it had not been given notice of the Carpenters/RioCan litigation – The Board found that the Carpenters did not have actual notice of the sale until 2010 and was not prepared to impose an obligation on the union to carry out ongoing searches of title to property that might affect its bargaining rights – Motion dismissed, matter continues

BEFORE: Robert W. Kitchen, Vice-Chair.

APPEARANCES: *Steven G. Bosnick* and *Chris Crompton* appearing for the Applicant; *Roy Filion, Vince Berry* and *Evelyn Dormer* appearing for Retrocom Mid-Market Reit; *Jeremy Schwartz* and *Jessica Young* appearing for RioCan Real Estate Investment Trust.

DECISION OF THE BOARD: January 23, 2013

1. Board File No. 3076-10-R is an Application by The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (the "Carpenters") filed under sections 69 and 1(4) of the *Labour Relations Act, 1995,* S.O. 1995, c.1, as amended (the "Act") claiming a sale of a business and/or related employer between RioCan Real Estate Investment Trust ("RioCan") and Retrocom Mid-Market Reit ("Retrocom").

2. The Application under section 1(4) was subsequently withdrawn. By decision of the Board, Highway 93 Property Holdings Inc. ("Highway 93") was added as a party to the section 69 Application.

3. By letter dated September 25, 2012, counsel for Retrocom advised Union counsel that he intended to bring two preliminary motions to dismiss the Application as follows:

> (a) Denial of natural justice based on the failure to provide notice to the Respondents of the proceedings before the Board in File Nos: 3081-99-R and 3082-99-G.
>
> (b) Denial of natural justice based on the multiplicity of proceedings and re-litigation that the Respondents have been subject to in this matter as a result of mid-hearing cancellations by the Board.

4. Having heard the submissions of the parties, the Board ruled that it would hear these motions as preliminary matters and each party would have an opportunity to call evidence material to the preliminary issues. The parties agreed that should the preliminary motions be dismissed, that evidence would also apply to the main Application.

BACKGROUND

5. Regrettably, there is significant history to this file, much of which is not in dispute.

6. In 1998, RioCan purchased from Burnac Corporation and/or Burnac Leaseholds Limited ("Burnac") six commercial shopping centres in Ontario, including the Cambrian Mall in Sault Ste. Marie and the Mountainview Mall (the "Mall") in Midland, Ontario.

7. On January 17, 2000, the United Brotherhood of Carpenters and Joiners of America, Local 446 ("Local 446") brought an Application under section 69 of the Act, claiming that a sale of business had taken place between Burnac and RioCan in respect of the Cambrian Mall and, inferentially, the other five properties in Ontario, including the Mall.

8. The matter was heard before Vice-Chair Stamp who unfortunately passed away prior to rendering a decision. The matter came back before Vice-Chair Silverman who rendered two decisions. In a decision dated April 14, 2008 (the "Merits Decision"), the Board found that a sale of a business had taken place and granted the section 69 Application. In a further decision dated April 28, 2010, (the "Remedial Decision"), the Board declared that RioCan was bound by the Carpenters' Provincial Collective Agreement in respect of the six properties in Ontario, including the Mall, and had been so bound since the sale in 1998, (all of which is collectively referred to as the "RioCan litigation").

9. In a press release on its website dated May 31, 2005, RioCan announced an agreement to sell certain properties to Retrocom, including the Mall. In a further press release dated July 26, 2005, RioCan announced that the sale to Retrocom had been completed. The sale of the Mall to Retrocom had been completed prior to Local 446's section 69 Application coming back before Vice-Chair Silverman. The hearing before Vice-Chair Silverman, which took place after the sale of the Mall to Retrocom, took place without any notice of the hearing given to Retrocom.

10. The parties in the instant Application differ from those in the RioCan litigation. However, in the RioCan litigation, Mr. B. Calligan, Secretary Treasurer of the Carpenters, was copied on the Application, various correspondences to the Board, correspondence between counsel, the Response to the Application and various notices of hearing. On certain correspondence from Local 446's counsel to the Board, Mr. Calligan was copied while Mr. G. Scott of Local 446 was not. While Mr. Scott appeared at the Board in the Merits Decision, Mr. Calligan, and not Mr. Scott, appeared at the Board on the Remedial Decision. The Board requires the Carpenters to be copied when there is such a proceeding before the Board.

11. The Remedial Decision was rendered April 28, 2010. The Carpenters wrote to Retrocom on September 28, 2010 grieving that Retrocom was in violation of the Carpenters' Provincial Collective Agreement. This was the first time that Retrocom learned of any allegation that it was bound to the Carpenters' Provincial Collective Agreement, five years after it purchased the property. The Carpenters then filed the instant Application dated December 16, 2010.

12. The matter came on for hearing before Vice-Chair Mark Lewis on May 4, 2011. The Board dealt with certain procedural and production issues at that time. The hearing commenced on the merits on August 19, 2011. Mr. Sanghera, an executive of Retrocom, was called as a witness. He explained the documents involved in the transaction, the improvements made to the

Mall and that Highway 93 holds title to the Mall. He was cross-examined by counsel for the Carpenters.

13. The matter was scheduled to continue on October 11 and 12, 2011. On September 27, 2011 the parties were advised that Vice-Chair Lewis was leaving the Board and the hearing could not proceed on those dates.

14. The hearing recommenced on February 14 and 17, 2012 before Vice-Chair Serena. Mr. Sanghera gave his evidence again and his cross-examination was completed. The second witness was Mr. V. Berry, in-house legal counsel for Retrocom, and his examination-in-chief was completed.

15. The hearing was scheduled to continue on May 29, 2012. On April 2, 2012 the parties were advised that it was necessary to adjourn that date. On July 23, 2012 the parties were advised that Vice-Chair Serena would not be continuing with the hearing.

16. The matter came on before this panel of the Board on October 1, 2012.

17. The Agreement of Purchase and Sale between RioCan and Retrocom and a Property Management Agreement between Retrocom and RioCan Property Services were introduced. Pursuant to the Agreement of Purchase and Sale, RioCan made certain representations and warranties. RioCan represented as follows:

> 5.2 Representations of the Vendor:
>
> The Vendor represents and warrants that as of the date of this Agreement:
>
> (d) to the best of the Vendor's knowledge and belief, there are no collective agreements, certifications, organizing drives by a union, certification applications or similar proceedings affecting or relating to any Property and there are no employees with respect to the Purchased Assets except those that are in the employ of RioCan Property Services Trust, the manager;

18. However, pursuant to the terms of the Agreement of Purchase and Sale, the representations and warranties of RioCan only survived for a period of one year from the date of closing.

19. Retrocom also entered into a Property Management Agreement with RioCan Property Services, which was in effect for a period of three years from the date of closing. Under this Agreement, RioCan Property Services acted as both the property manager and the leasing agent.

20. Other than the representations and warranties it received from RioCan, Retrocom made no inquiries with respect to labour relations matters and did not conduct any due diligence at the Board.

EVIDENCE OF VINCE BERRY

21. Mr. V. Berry was called as a witness for Retrocom. He was called to the Ontario Bar in 1993. Since that time he has practiced principally in the area of commercial real estate. He practiced with a number of law firms acting on hundreds of commercial real estate transactions on behalf of buyers, sellers and lenders. He was also employed as counsel to GMAC Commercial Mortgage where the focus was mortgage loans on commercial income producing properties. As counsel, he supervised outside counsel and ensured that the mortgage loans were properly documented. Mr. Berry joined Retrocom in October 2010 as counsel. His responsibilities include employment, governance, corporate and commercial, acquisitions and financings.

22. He explained that due diligence referred to the inquiries and investigations which are made prior to the closing of the transaction to ensure that "all is what it is said to be" This includes searching the title to the property, investigations with government authorities for taxes, zoning and outstanding work orders and engineering investigations to examine environmental contamination, structure of buildings, roof and HVAC units.

23. He had never heard of the Ontario Labour Relations Board website through which a Board solicitor may be contacted for due diligence inquiries. Other practicing counsel that he spoke with were surprised that such a website existed.

24. He makes inquiries of others at Retrocom and no one was aware of the RioCan litigation involving the Mall. He reviewed the documentation concerning the acquisition of the Mall from RioCan and there was no evidence or documentation concerning any litigation related to the Mall.

25. He testified that the representations and warranties found in the Agreement of Purchase and Sale were normal as was the 12 month survival period. Representations and warranties are sought for items the purchaser cannot research on its own. The 12 month survival period is determined by the real estate market with competing buyers and if there was a problem with the property, it would normally show itself within the year.

26. As a prudent commercial real estate counsel, if he had been given notice of hearing, he would want to "have a seat at the table".

27. In 2006, if someone wanted to know the owner of the Mall, the person could attend at the Registry Office with the municipal address of the property and obtain a title parcel page abstract showing the owner of the property. Highway 93 shows as owner of the Mall but since the address for service is the same as Retrocom, it would be traced back to Retrocom.

28. He confirmed that, pursuant to the Agreement of Purchase and Sale, Retrocom had no recourse against RioCan for breach of a representation or warranty following the expiry of one year.

29. On cross-examination, he confirmed that, in mergers and acquisitions, he only worked on the real estate part. He confirmed that when purchasing a factory or other operating entity, employment and labour inquires would be carried out. However, he personally did not do the employment and labour checks in those transactions. If he needed to do employment and labour checks, he knew who to contact. However, he stated that he did not need to do "full due diligence" when he was simply buying a real estate asset, not an operating business.

30. He confirmed that his discussions with other lawyers concerning the Board's website were with real estate lawyers, not merger and acquisition lawyers.

31. He advised that the survival period for representations and warranties was part of negotiations. In his view, a purchaser would not offer more money for a longer survival period.

32. He advised that it was very difficult to get a Certificate of Pending Litigation registered on title and he had never seen an Ontario Labour Relations Board proceeding registered on title.

33. He confirmed that environmental due diligence has been increasing in recent years. This was due to changes in the law and obligations of property owners. Owners get "tagged with the sins of the past" if they are not aware going in.

34. He advised that currently Smart Centres is the leasing agent for the Mall. Typically, signs are put up in the Mall identifying whom to contact for leasing opportunities. These signs would normally identify Smart Centres as the contact. He confirmed that Retrocom does not typically identify itself in the malls which it owns.

35. On re-direct, he confirmed that Retrocom does not do any construction itself. It only employs office employees.

EVIDENCE OF GERD SANGHERA

36. He is Director of Asset Management for Retrocom and has worked for Retrocom since September 2006, initially as a contractor, then as an employee. His responsibilities include property operations, reviewing and approving leases, reviewing mortgages, and he has some involvement with acquisitions.

37. The letter from the Carpenters dated September 28, 2010 came to his attention. It was very surprising since it affected an asset which Retrocom had owned for over five years. Retrocom did not know anything about the RioCan litigation until it received this letter. He made inquiries of persons who were employed by Retrocom in 2005, including the CEO, CFO and General Counsel, none of whom had any knowledge of the RioCan litigation. He confirmed that, as a prudent asset manager, had he received notice of the RioCan litigation, he would have retained counsel, sought advice and participated in the proceeding. He also confirmed that Retrocom does not employ trades people, the work is contracted out. Further, Retrocom does not employ any property level staff.

EVIDENCE OF CHRIS CROMPTON

38. He is a business representative of Local 27 of the Carpenters and has held this position since 1999. Since February, 2000 he has had responsibility for Board Area 18, Simcoe County. The Mall is located in this area.

39. In 2005, Mr. Calligan was President of the Carpenters. He retired in October 2009.

40. Prior to 2010, Mr. Crompton visited all of the malls and the sites in this area, including the Mall. His purpose was to see who was doing "fit ups" This refers to reconfiguration of retail space in a mall and involves construction work.

41. On a visit to the Mall, he observed signage in a vacant store. It identified RioCan for leasing inquires and a telephone number. This has since changed to Smart Centres. He has never seen a sign identifying Retrocom in any way related to the Mall.

42. He was generally aware of the RioCan litigation. He periodically checked with Susan Nicolson, a clerical employee at the Carpenters' office, to see if there had been a decision. Mr. Calligan spoke to him about the case and told him of the "appeal" of the original decision in which the Carpenters had RioCan properties across the province. He was also advised of the final outcome and was aware that the decision was limited to the former Burnac properties.

43. After this, he made a conscious effort to visit the Mall and observe who was doing the work. In July, he observed people doing drywall in the Hallmark Cards store. He inquired and was advised that they were non-union. He consulted the Carpenters' legal counsel. He returned to the administrative office at the Mall to obtain a contact for RioCan and was advised that Retrocom was the contact. Prior to that, he had no knowledge that Retrocom was associated with the Mall. He received a generic business card for Retrocom.

44. Following the visit, he returned to the office and the grievance was prepared. After the grievance was filed, he instructed people to do a search. He observed as the RioCan website was googled and the press releases of May 31 and July 26, 2005 were printed off.

45. He testified that although there was a business representative of Local 675 who looked after drywall, no one but himself with the Carpenters had responsibility for Midland. He also stated that if he wanted to know the legal owner of a property, he would give the municipal address to someone in the office who would conduct a search. However, he does not request searches for all the properties he monitors.

46. On cross-examination, he confirmed that he did not speak to anyone in the Carpenters about the sale of the Mall to Retrocom, except legal counsel. He last spoke to Mr. Calligan in May of 2012 at a golf tournament, but didn't discuss this case. Mr. Crompton did not directly interact with Mr. Calligan. He still sees him at social functions but Mr. Calligan is completely removed from the Carpenters. He has never discussed this case with Mr. Calligan.

47. He confirmed that he was aware that the Carpenters in this Application were relying on the sale of the business from RioCan to Retrocom in 2005. He repeated that he had thought that RioCan owned the Mall and he had seen the RioCan sign in the window of the vacant store. He had gone to the Mall to get the correct address and contact person at RioCan in order to file the grievance. He could not recall when the sign changed to Smart Centres.

48. There are people in the Carpenters' office who are Internet friendly. He confirmed that it didn't take long to get the information concerning the sale of the Mall from RioCan to Retrocom. It only took a few minutes to google it and obtain the press releases.

49. He confirmed that he has had no discussions with the President, Vice-President or any other members of the Carpenters' executive concerning this case. He is the main contact person in the instant Application. It was his idea to bring this Application and he didn't "bounce it off" anyone besides legal counsel.

50. He could not recall whether he participated in the initial hearing in this Application but he acknowledged that he had seen Retrocom's Response. He was aware that it was Retrocom's position that this Application should be dismissed because of the failure to give Retrocom notice of the RioCan litigation. Notwithstanding that knowledge, he confirmed that he had made no inquiries concerning this case.

51. He visits malls all the time to monitor the work to determine whether the collective agreement is being followed. If the site is non-union, he will attempt to organize the site. If he does not know the name of the owner of a mall, he gives the address to someone in the office who will find out the owner of the property.

EVIDENCE OF JONATHON GITLIN

52. Since 2007, he has held the position of Senior Vice-President, Investments for RioCan with responsibility for overseeing acquisitions and dispositions in North America. He joined RioCan in June 2005 as Director of Investments assisting the Vice-President, Katie Ritcey, with acquisitions, dispositions and co-ownerships. Michael Connolly was Senior Vice-President, Construction and in 2005 was in charge of construction.

53. When he started with RioCan, he was only aware of the RioCan litigation in broad generalities. He didn't get much information. He did not know who else from RioCan was involved in the RioCan litigation beyond Katie Ritcey and Michael Connolly. He was loosely aware of the Agreement of Purchase and Sale of the properties from RioCan to Retrocom in 2005 but as he had just started, he was not part of the transaction.

54. He was not aware of anyone at RioCan giving Retrocom notice of the RioCan litigation. He was not aware of anyone at RioCan giving the Carpenters notice of the sale of the property to Retrocom.

DECISION

55. During argument, counsel for Retrocom advised the Board that Retrocom was not pursuing the second preliminary motion seeking to dismiss the Application on the ground of multiplicity of proceedings. Therefore, the issue for the Board to determine is whether the Application should be dismissed due to a denial of natural justice based on the failure of Retrocom to receive notice of the RioCan litigation. The allegation is Retrocom's failure to receive notice, rather than laches or delay in bringing the instant Application.

56. The Board accepts the following facts. In 1998, Burnac sold a number of properties to RioCan, including the Mall. An Application seeking a declaration that RioCan was a successor employer was filed January 17, 2000. In the circumstances referred to above, that matter came on for hearing before Vice-Chair Silverman on June 13, 2006. At the time the matter came on for hearing, the property had already been sold by RioCan to Retrocom. The Merits Decision was rendered on April 14, 2008. The Remedial Decision was rendered on April 28, 2010.

57. In a press release on its website dated May 31, 2005. RioCan announced the sale of certain properties, including the Mall, to Retrocom. In a further press release on its website dated July 26, 2005, RioCan announced that the sale of the properties had been completed. RioCan never advised Retrocom of the ongoing RioCan litigation affecting the Mall.

58. From the time it purchased the Mall in July 2005 until it received the letter from the Carpenters dated September 28, 2010 grieving that Retrocom was in violation of the Provincial Collective Agreement, Retrocom had no idea that the Mall was the subject matter of the RioCan litigation and a claim by the Carpenters that RioCan was bound by the Provincial Collective Agreement, at least in respect of the seven properties it purchased from Burnac. The Board is satisfied that if Retrocom had been given notice of the RioCan litigation or, otherwise become aware, it would have sought to intervene in the proceeding.

59. The following issues were argued before the Board:

- Did the Carpenters have actual notice of the sale of the Mall to Retrocom prior to July, 2010?
- If not, ought the Carpenters to have known of the sale of the Mall to Retrocom prior to July, 2010?
- Should the Board draw an adverse inference given the failure of the Carpenters to call Mr. Calligan as a witness?
- If the Carpenters had either actual or constructive notice of the sale to Retrocom, did it have an obligation to give notice of the RioCan litigation to Retrocom?
- In any event, did Retrocom have sufficient interest to intervene in the RioCan litigation?

ACTUAL NOTICE

60. The Board accepts the uncontradicted evidence of Mr. Crompton concerning the discovery of the sale to Retrocom. He had sole responsibility for monitoring Simcoe County in which the Mall is located on behalf of the Carpenters.

61. After 2005, a RioCan company continued to be the contact for leasing inquiries. This subsequently changed to Smart Centres. Retrocom was not identified in the Mall at any time and this was confirmed by Messrs. Berry and Sanghera who testified that it was not the practice of Retrocom to do so.

62. In July 2010, after the Remedial Decision, Mr. Crompton observed work being performed in a store in the Mall. He was told the work was being done non-union. He subsequently attended at the Mall's administration office to obtain a contact for RioCan. He was advised that the Mall was owned by Retrocom. He subsequently observed a computer search of the RioCan website leading to the discovery of the 2005 press releases announcing the sale of the Mall to Retrocom. Thereafter, with the assistance of legal counsel, he prepared and filed the grievance dated September 28, 2010.

63. Counsel for Retrocom notes that in paragraph 6 of the Remedial Decision, reference is made to the fact that some of the RioCan properties had been sold. He relies on this as evidence of actual knowledge. However, no specific properties were referred to in the Remedial Decision. In the context of a claim by the Carpenters that the Provincial Collective Agreement bound all of RioCan's properties in Ontario, this appears to be a reference to RioCan's whole portfolio of properties in Ontario rather than any particular properties.

64. Given that the Carpenters filed section 69 Applications when it became aware of the sale of the Mall initially from Burnac to RioCan and then RioCan to Retrocom, it is a fair inference that if the Carpenters had actual notice of the sale, its response would have been an Application under section 69 rather than providing notice of the RioCan litigation to Retrocom. The Board therefore finds that the Carpenters did not have actual notice of the sale until July 2010.

CONSTRUCTIVE NOTICE

65. Counsel for Retrocom strongly and ably asserted that the Carpenters ought to have known of the sale to Retrocom in 2005. He noted that the information on the sale was in the public domain since that time. A simple search of the RioCan website, as was conducted in July 2010, would have disclosed this information in a matter of minutes. Further, Mr. Crompton was fully aware of how to conduct a search to determine the owner of a property. The Carpenters could easily have discovered the sale to Retrocom if it had taken the time to do so.

66. The issue for the Board to determine is this. When a trade union has commenced a section 69 Application seeking a declaration that an employer is a successor employer, is a trade

union obliged to search the website or title to property of the employer on an ongoing basis to determine whether there may be a subsequent event affecting its claim to bargaining rights?

67. This would impose an onerous obligation on a trade union. In this case, there is no evidence that the sale was reported in the press or otherwise publicized. A RioCan company continued to appear as the contact for leasing inquiries until July 2008. Retrocom was never identified with the Mall.

68. In the absence of some event or information that should cause a trade union to conduct a further investigation or search, the Board is not prepared to impose such a general obligation on a trade union and declines to do so. Therefore, the Board finds that the Carpenters did not have constructive notice of the sale of the Mall to Retrocom.

ADVERSE INFERENCE

69. Counsel for Retrocom submitted that the Board should draw an adverse inference due to the failure of the Carpenters to call Mr. Calligan as a witness. Mr. Calligan was involved in the RioCan litigation. He was copied on the Application, correspondence to and from the Board and appeared before the Board at the Remedial Decision. This creates, in counsel's submission, a strong presumption that the Carpenters were not merely an interested party in the RioCan litigation, but were an integral player. The inference is that Mr. Calligan was instructing in at least part of that proceeding.

70. He notes that Mr. Crompton had little knowledge of the RioCan litigation. However, he asserts that Mr. Crompton cannot speak for Mr. Calligan. There is no question that Mr. Calligan had such knowledge. The Carpenters, it was submitted, could and should have called Mr. Calligan to testify that he did not know of the sale to Retrocom. Further, Mr. Calligan could have testified whether a search was conducted to determine the ownership of the Mall and, if not, why not. There was no explanation for the failure of the Carpenters to do so.

71. Counsel submits that, in these circumstances, an adverse inference should be drawn that if Mr. Calligan had been called to testify, his evidence would not have been helpful to the Carpenters.

72. In support, the Board was referred to the following from *Bryant, Lederman and Fuerst, Sopinka, Lederman and Bryant: The Law of Evidence in Canada, 3rd. ed.*:

> In civil cases, an unfavourable inference can be drawn when, in the absense of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such a failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.

> An adverse inference should only be drawn after a *prima facie* case has been established by the party bearing the burden of proof.

73. The Board was also referred to *Homes et al. v. Alexson et al.* (1975), 7 O.R. 2nd. 11 (ON HCJ); *Charterways Transportation Ltd.*, [1982] OLRB Rep. April 552 and *Fab-Air Metal Industries*, [2005] OLRB Rep. January/February 48.

74. Counsel for the Carpenters submits that a *prima facie* case must be established before an adverse inference can be drawn. There is no evidence to suggest that Mr. Calligan had actual knowledge of the sale of the Mall to Retrocom. It was not pleaded that he had actual knowledge of this sale.

75. Further, there is no evidence that Mr. Calligan tried to conduct a search of RioCan's properties in 2005. There was also no reason to conduct such a search. No circumstance or event had occurred in 2005 which would give cause to conduct a further investigation into the ownership of the Mall.

76. The Board accepts the submission of the Carpenters and declines to draw an adverse inference because of the failure to call Mr. Calligan as a witness. As noted in *The Law of Evidence in Canada,* a *prima facie* case must first be established before an adverse inference may be drawn. There is no evidence to suggest that Mr. Calligan had actual knowledge of the sale or had a reason to conduct a search.

77. The cases referred to are distinguishable on this ground. In *Holmes v. Alexson,* a party failed to call a key witness to resolve an issue of credibility concerning an extension of time in a real estate transaction. In *Charterways Transportation*, a witness who was present throughout a conversation was not called to corroborate what was said in that conversation. In each of these cases, a *prima facie* case had been established and an adverse inference was drawn because of the failure to call a key witness whose evidence could have assisted in resolving the conflict.

78. In *Fab-Air Metal Industries*, an adverse inference was drawn when a party failed to call as witnesses either of two decision-makers when the party had the onus of establishing that a transfer was not a reprisal under the *Occupational Health and Safety Act*.

79. In this case, there is no conflict to be resolved. While the Board accepts that the Carpenters and, Mr. Calligan in particular, were an integral part of the RioCan litigation, that does not impute any knowledge of the sale to Retrocom. The uncontradicted evidence of Mr. Gitlin was that RioCan never advised the Carpenters of the sale of the Mall to Retrocom.

80. Having regard to the Board's finding that the Carpenters had neither actual nor constructive notice of the sale of the Mall from RioCan to Retrocom in 2005, it is unnecessary to determine whether the Carpenters had an obligation to provide notice if it had such knowledge or whether Retrocom had sufficient interest to intervene in the RioCan litigation.

81. Therefore, for the reasons herein, the motion to dismiss the Application because of a denial of natural justice is dismissed.

82. One further point deserves comment. Counsel for Retrocom submitted that a "wrong" had occurred and there must be a remedy to rectify that "wrong" On its face, a "wrong" may well have occurred. Katie Ritcey of RioCan both signed the Agreement of Purchase and Sale containing the representation and warranty found in paragraph 5.2 (d) and fully participated in the RioCan litigation. Yet, neither she, nor anyone else at RioCan advised Retrocom of the RioCan litigation. While it is not the role of the Board to interpret representations and warranties in a commercial agreement, it appears that a "wrong" has been committed by RioCan, not the Carpenters. However, as part of commercial negotiations, Retrocom agreed that the representations and warranties only survived for a period of one year from the date of closing. If RioCan has committed a "wrong", it appears that Retrocom is of the view that it can no longer pursue a remedy.

83. The matter is referred to the Registrar to set further dates for hearing. This panel of the Board remains seized.

1616-11-ES Safaa Sabbah, Applicant v. **University of Ottawa** and Director of Employment Standards, Responding Parties.

Employment Standards – Change in Working Conditions – Termination – The applicant sought termination and overtime pay from her former employer under section 116 of the *Employment Standards Act* ("Act") – The applicant, a graduate student employed in a laboratory for 30 hours per week, refused to extend her employment after being presented with an employment contract containing an intellectual property clause – Regarding termination pay, the Board considered whether the employee was constructively dismissed – Based on an objective analysis, the Board found the applicant had no reason not to believe that the contract represented new terms and conditions of her employment; the applicant was informed that she had to sign the contract in order to continue employment; and the inclusion of the clause was a change in fundamental term and condition of employment – Thus, the applicant was constructively dismissed – This conclusion was not affected by the fact that the clause was included in error – The applicant testified that she regularly worked beyond 30 hours per week in order to complete her work – The applicant's entitlement to overtime pay arose under the Act and not the university's policy because the applicant never sought authorization for the extra hours worked as required by the policy – In determining whether the employee received the employment standard or a greater contractual benefit in relation to hours worked in excess of 30 hours per week, but not in excess of 44 hours per week, the Board examined whether the applicant was a salaried employee or an hourly paid employee in form and substance – Salary is used to describe a fixed periodic payment for services rendered, but other characteristics, such as variation in compensation for hours worked, should be considered – The applicant was a salaried employee because her salary did not vary with

the fluctuating hours she worked in each week – Nothing in the Act entitles a salaried employee to receive additional compensation for hours that exceed the normal hours, but are less than 44 hours per week, except where the employer does not pay the salaried employee at least the prescribed minimum wage under the Act – Although the applicant was entitled under the Act to overtime pay for hours worked in excess of 44 per week, the evidence was unclear whether the applicant worked more than 44 hours in any week – The applicant was entitled to termination pay and vacation pay, but not overtime pay – Application granted, in part

BEFORE: Ian Anderson, Vice-Chair.

APPEARANCES: *Safaa Sabbah* and *Batoul Salameh* appearing for the applicant; *Alain Roussy, Dr. Syed Sattar, Dr. Susan Springthorpe* and *Ms. Diane Dinelle* appearing for the responding party; no one appearing for the Director of Employment Standards.

DECISION OF THE BOARD: February 5, 2013

1. This is an application under section 116 of the *Employment Standards Act, 2000*. Safaa Sabbah seeks termination pay and overtime pay from her former employer, the University of Ottawa.

2. Ms. Sabbah was employed in the position of "Junior Technologist" for the period March 1, 2009 to March 31, 2010 at a salary of $28,000 per year for 30 hours per week. She was employed in the lab of Professor Syed Sattar, the Centre for Research on Environmental Microbiology.

3. Ms. Sabbah testified on her own behalf. Prof. Sattar, Dr. Susan Springthorpe (the Director of Research for the Centre, and Prof. Sattar's "second in command") and Diane Dinelle (an Administrative Officer in the University of Ottawa's Human Resources Services department ("HRS") testified on behalf of the University.

Termination Pay

4. Prior to her employment, Ms. Sabbah had worked in Professor Sattar's lab as a graduate student, successfully completing her Master's degree. A reference letter from Prof. Sattar provides a summary of her accomplishments as a graduate student. Her thesis related to "studies on the microbicidal activities of chemicals for the remediation of environmental surfaces accidentally or deliberately contaminated with infectious bioagents". During the course of her work as a graduate student, Ms. Sabbah developed a "'universal' chemical neutralizer which was to be effective against a variety of microbicides while being harmless to the test microbes as well as their host cells" Prof. Sattar described this as:

> … an almost impossible task, which could not be successfully tackled by others in my lab. She managed to do it with sheer hard work and perseverance! The formula thus developed has many applications.

5. Ms. Sabbah wished to pursue a Ph.D. Prof. Sattar was happy to offer employment to Ms. Sabbah in the interim. Some work arising from Ms. Sabbah's studies as a graduate student under Prof. Sattar's supervision continued after her relationship changed to that of an employee in his lab. That work was no longer being done as a graduate student: Ms. Sabbah had completed her degree. Of particular importance to Ms. Sabbah, there was the possibility that the universal neutralizer which she had developed would be patented and she continued to work with Dr. Sattar on a paper in relation to it.

6. Ms. Sabbah commenced her employment with the University on March 1, 2009. However, a written contract in relation to her employment was not generated until June 25, 2009. It was signed by Ms. Sabbah on July 14, 2009. It provided in part:

> It is agreed and understood that this position is remunerated through the University of Ottawa by a granting agency and that the continuity of employment in this position as well as any future salary adjustments are dependent on the availability of funds from the granting agency and subject to other terms and conditions herein.

The duration of employment was described as follows:

> Your employment begins on March 1st, 2009 and ends on September 30th, 2009, at the latest, unless renewed in writing by the University of Ottawa before that date.

7. Whether this contract constituted employment for a fixed term or task need not be determined in this case. Ms. Sabbah's employment continued beyond September 30, 2009. While it appears that the University intended that this extended period of employment would be covered by successive fixed term contracts, this was not done.

8. Ms. Sabbah's employment was extended by the University on three occasions. These extensions were triggered by requests from Prof. Sattar's lab. In accordance with the usual procedure, the requests were directed to HRS. The requests are made electronically. HRS' procedure is to print off a document of the request on the date that it is processed by HRS (I will call this a "Renewal Form"). On September 22, 2009, HRS extended Ms. Sabbah's employment for the period October 1, 2009 to December 15, 2009; on November 30, 2009, HRS extended Ms. Sabbah's employment for the period December 16, 2009 to January 31, 2010; and on January 21, 2010 HRS extended Ms. Sabbah's employment for the period February 1, 2010 to March 31, 2010. Ms. Dinelle testified that a new written contract should have been created for each of these periods of time. Responsibility for doing so lies with HRS. HRS did not generate new contracts. Ms. Dinelle testified that this was as a result of staff shortages. Ms. Sabbah, however, continued to work in Prof. Sattar's lab and to be paid for doing so.

9. By a standard form memo dated February 12, 2010, Ms. Dinelle, of HRS, advised Dr. Sattar that Ms. Sabbah's contract would lapse on March 31, 2010 and requested that she be advised as soon as possible if Dr. Sattar wished to "re-activate" this contract. The memo was returned to Ms. Dinelle with an annotation from Dr. Springthorpe dated March 11, 2010

requesting that the contract be renewed to June 30, 2010. A Renewal Form was printed by HRS on March 22, 2010, extending Ms. Sabbah's employment for the period April 1, 2010 to June 30, 2010. Dr. Sattar and Dr. Springthorpe were asked, but neither could recall whether Ms. Sabbah was specifically told prior to the end of March 2010 that her employment was to be continued until the end of June 2010. Ms. Sabbah was not asked this question.

10. On March 23, 2010 a new contract was generated by HRS for Ms. Sabbah for the period February 1, 2010 to March 31, 2010. That contract, unlike the initial contract, included a paragraph regarding intellectual property rights which provided as follows:

> 9. **INTELLECTUAL PROPERTY**: Intellectual Property may include: technical information, know-how, copyrights, patents, models, patterns, drawings, specifications, prototypes, inventions, etc.
>
> As a condition of employment, you agree to assign ownership of all Intellectual Property you create, develop or produce pursuant to this agreement to the University of Ottawa. You agree to execute such additional conveyances and other documents conveying title or copyright to such Intellectual Property to the University of Ottawa as the University of Ottawa may require. Should any Intellectual Property assigned to the University of Ottawa be in form of copyrights, as an author of copyrighted intellectual property, you hereby permanently waive your moral rights as defined in the Copyright Act, in respect of such Intellectual Property.

As discussed further below, this paragraph was inserted in the contract in error. Unfortunately, however, neither Ms. Sabbah nor Dr. Sattar was aware of this until some time later.

11. A copy of the March 23, 2010 contract was sent to Ms. Sabbah. She was very upset by the inclusion of the paragraph with respect to intellectual property. She saw or came to see it as an attempt by Dr. Sattar, the University or both to appropriate her work on the universal neutralizer. By email dated March 26, 2010 Ms. Sabbah wrote Dr. Sattar (who was in Europe at a conference at the time) as follows:

> With lots of sadness I would like to inform you that I am not going to accept/sign that new contract which is for the first of February 2010 and ends the 31st of this month, March 2010. There are some issues with it I do not agree with. So, please consider that my last day as defined by the so mentioned contract the end of this month March 31st or earlier if you wish since there is no really contract between us.

12. By email dated March 26, 2010, Dr. Sattar responded:

> I am quite disappointed to read this. Would like to discuss the issue upon my return.

13. By email dated March 27, 2010, Ms. Sabbah responded:

> I am also quite disappointed things have to end that way. But, I had no choice but to take that decision as you know. We have to discuss all the issues upon your return. Let me know what time you want to do that, you are quite good at planning.

14. Dr. Sattar sent Ms. Sabbah a further email on March 27, 2010, copied to Dr. Springthorpe, asking that Ms. Sabbah discuss the matter of the contract with Dr. Springthorpe. By email dated March 29, 2010 to Dr. Springthorpe, Dr. Sattar wrote, in relevant part:

> Sue, I am not sure what spooked Safaa about the contract she received from the University. Please discuss the matter with her and reassure her she does not have to sign the contract if she feel[s] uncomfortable about any of the conditions in it. She is a good worker and it would be sad to let her go because of it.

15. Dr. Springthorpe met with Ms. Sabbah on March 29, 2010. She documented the meeting in an email dated March 30, 2010 to Dr. Sattar, copied to Ms. Sabbah. In the email Dr. Springthorpe noted that Ms. Sabbah's concern related to the insertion of the intellectual property paragraph into her contract. Dr. Springthorpe stated in part:

> This was not in a previous contract and Safaa certainly feels that it is not correct that she should have to do this. I have some sympathies with this position though I know it is usual or common for such a clause to be in employee contracts.

Ms. Sabbah had indicated that she thought that Dr. Sattar had put the clause in the contract. Dr. Springthorpe "assured her that you had probably never seen any of these contract wordings let alone tried to modify them which I am sure the University would not allow you to do." Dr. Springthorpe noted that fundamentally Ms. Sabbah was concerned with protecting her intellectual property in the universal neutralizer formulation and that Ms. Sabbah was looking for confirmation from Dr. Sattar in writing as to his intent. Dr. Springthorpe continued:

> As I understand it, she would like to be first author on a paper on the neutralizer, or a patent. However, I explained to her that a patent was unlikely because the University would likely not pay for it since the potential market is not huge. She also indicated, fuelled by others in the lab talking to her, that she thought you had been in talks about the neutralizer with one or more companies and that she was unhappy with this since she was not being told what was happening and she considered that it concerned her future prospects.

Dr. Springthorpe also noted:

> Safaa is hoping to have either a PhD supervisor or other prospects in place by May of this year and at present is unwilling to continue her employment here beyond end of April.

She also noted the issue of the "formal contract" remained and that Ms. Sabbah was not prepared to sign a contract with the intellectual property clause. Dr. Springthorpe had made a call to the University's human resources department (in Ms. Sabbah's presence) to inquire but had not heard back.

16. Ms. Sabbah wrote a responding email dated March 30, 2010, and copied to Dr. Sattar in which she stated:

> Thank you Sue, and I am hoping to hear from Dr. Sattar very soon. I have always respected him and I don't want to lose my trust in him. But, let me assure you, I am not going to be quiet at all if that trust is misused or not used the right ways.

17. Dr. Sattar wrote an email to Ms. Sabbah dated March 30, 2010, copied to Dr. Springthorpe:

> Just to assure that I respect your contribution to our studies and will not deprive of any credit that is due to you. That is simply not my style. I have not discussed the matter of the neutralizer with anyone for patenting or whatever except with folks at the university. That was before you started work on the project. As Sue has mentioned, the university is not interested in getting us a patent. We need to have the manuscript written and at that time we will review the matter of seeking a patent or submitting the paper for publication. As far as the contract is concerned, I had nothing to do with the wording about IP. I was not even aware that the university is now adding such a statement. I hope this clarifies matters. Bye for now.

18. Ms. Sabbah responded by an email of the same date. It states in part:

> [T]hank you Dr. Sattar, however I am still not going to sign the contract renewal for that IP condition. ....
> I still need to talk to you in person, and to make a written agreement about what you have just assured me in your message. And as Sue mentioned to you I prefer to leave the lab by the end of April this year.

19. At this point I find that Ms. Sabbah intended to work to the end of April, 2010. She had, however, made it clear that she was not going to sign the March 23, 2010 contract. In fact Ms. Sabbah did not work in the lab after March 31, 2010.

20. At 8:00 a.m. on April 1, 2010, Dr. Sattar sent an email to Ms. Sabbah and Dr. Springthorpe with respect to the project on which Ms. Sabbah was working. He asked Ms. Sabbah to comment on a report which had been received in relation to that project. In effect, Dr. Sattar was proceeding on the basis that the employment relationship continued to exist. Ms. Sabbah had a negative reaction to this request. At 9:30 a.m. on April 1, 2010, Ms. Sabbah sent Dr. Springthorpe the following email:

> Please talk to Dr. Sattar and make him understand that I am not going to come again to the lab. I think he did not get it yet that I need a written agreement. I am very serious about that. I think he is still taking me for granted.

While not entirely clear, from the documents and evidence as a whole it appears that the "written agreement" which Ms. Sabbah wanted was one with respect to her intellectual property rights with respect to the universal neutralizer.

21. Dr. Springthorpe immediately emailed Dr. Sattar about Ms. Sabbah's most recent email and Dr. Sattar wrote an email to Ms. Sabbah asking her to clarify what she had in mind and expressing the hope that they could meet face to face. Ms. Sabbah responded:

> As you know Dr, I did not sign the contract and I did not hear from human resources yet why that condition of waiving intellectual property to the University was included in my contract. In my understanding unless I sign the contract you can not renew my position for April. I simply cannot assume that condition was added by accident, I have all the rights to protect my IP and my right to publish/patent as a first author. So I consider myself in conflict with the university until everything is cleared to me and I reserve all the right to defend myself against the university. Therefore at this point I cannot simply come to the university.

22. Dr. Sattar responded on April 1, 2010 repeating that he had nothing to do with the insertion of the IP clause into the contract and had never seen it before. However he continued:

> If you do not wish to sign that contract with that condition, it is entirely your decision. However, I will need to know that so that we can cancel your payment for the month of April.

23. This April 1, 2010 email from Dr. Sattar to Ms. Sabbah was the first statement that could reasonably be understood as indicating to Ms. Sabbah that her employment would be terminated unless she accepted the March 23, 2010 contract with the IP clause. In sending this email, Dr. Sattar was acting on the mistaken belief that the University had in fact decided to amend contracts to contain such a clause. Two hours later on April 1, Dr. Sattar sent an email to HRS stating his understanding that the new contracts included the IP clause, noting that it was "rather restrictive" and had caused concerns as certain of his staff were refusing to sign and this was putting the work of the lab in jeopardy. He asked for an explanation for the amendment.

24. At this point, therefore, Dr. Sattar was of the view that Ms. Sabbah had to sign the contract with the IP clause if she wished to continue to work. Ms. Sabbah refused to do so, and took the position that she had been "pushed" into resigning: that is that she had been constructively dismissed.

25. Positions then began to harden. Ms. Sabbah responded to Dr. Sattar in an email dated April 1, 2010 stating in part:

> I am very disappointed with the way I was treated by uottawa. My feeling is that I would never ever come back to such a place again neither to work or as a student.

26. Dr. Sattar responded on April 2, 2010 stating in part:

> Please note that the university did not single you out in the way the contract has been written. Right or wrong, the new wording, I believe, is in all new contracts. I have already expressed my concerns on the issue to the university administration.
>
> ....
>
> If your decision is final, I would request you to send me an e-mail message at your earliest convenience so that I could ask the university to formally terminate your employment here with effect from March 31, 2010.

27. Ms. Sabbah responded in a lengthy email dated April 3, 2010. Much of it is not relevant to the issue in dispute before me. It stated in part:

> [Y]ou do not need a letter of resignation from me, because in reality I was pushed to put in that situation I never meant to leave the as you know before at least some publication for my best future. [Sic.]

28. Dr. Sattar responded in a lengthy email dated April 4, 2010. It makes two points that are relevant to the dispute before me. First, Dr. Sattar noted that Ms. Sabbah's work on the universal neutralizer took place before she was an employee, while she was a graduate student. Accordingly he noted that the IP clause inserted into the contract might not apply. Second, he stated:

> I have no control over our university's rules with regards to termination of an employee's contract. It was my obligation to bring the matter of a mandatory two-week notice to your attention. On my part, I will simply inform Diane Dinelle that your employment here be terminated as of March 30, 2010. I believe that was the last day you came to the lab.

29. On April 6, 2010 Dr. Sattar did in fact send an email to Ms. Dinelle, copied to Ms. Sabbah and Dr. Springthorpe, which reads as follows:

> Please terminate the contract of Ms. Safaa Sabbah (employee # [omitted]) with effect from March 30, 2010, as her last day of work here. She has indicated to me by email that she no longer wishes to work here because of her disagreement with Clause #9 of the employee contract (dated March 23, 2010) which I believe she received on March 25. Please let me know if you need more information.
> Best regards.

30. Ms. Dinelle responded minutes later to Dr. Sattar, with copies to Dr. Springthorpe and Ms. Sabbah, as follows:

> I just wanted to let you know, that I just received an email, stating that they sent the wrong contract to this employee. Has anyone gotten back to you explaining this situation?

Dr. Sattar responded immediately to Ms. Dinelle, with copies to Dr. Springthorpe and Ms. Sabbah:

> No one has. That mistake has caused us a lot of grief here.

This was, to say the least, an understatement.

31. This was followed by a flurry of emails back and forth on April 6, 2010 from Ms. Dinelle, Dr. Sattar and Dr. Springthorpe, all copied to Ms. Sabbah. A new contract, omitting the IP clause, was generated dated April 6, 2010 and sent out on April 7, 2010. In accordance with the University's usual practice, it was sent to Ms. Sabbah at her place of work in the University: i.e. Dr. Sattar's lab. On April 7, 2010, first Ms. Dinelle and then Dr. Sattar spoke directly with Ms. Sabbah, offering apologies. Ms. Sabbah, however, advised Dr. Sattar that she did not wish to have her contract renewed. She took the position that her contract had ended as of March 31, 2010 and she did not have to send in a note of resignation.

32. It is clear from Ms. Sabbah's emails, and her testimony, that she believed and believes that the insertion of the paragraph with respect to intellectual property was not an accident. She simply refuses to believe all of the evidence to the contrary or to accept the sincerity of the apologies and assurances she was given. The evidence does not support her position.

33. The University filed numerous emails and other documents as exhibits at the hearing. Some of those documents have been described in detail above. Ms. Sabbah accepted the authenticity of all of the documents with the exception of one email. (In that email, Ms. Dinelle switched from English to French mid email. Ms. Dinelle explained that the environment within which she works at the University is fluently bilingual and that she sometimes switches from English to French without even thinking about it. I accept this explanation.) What the documents and the evidence of Dr. Sattar, Dr. Springthorpe and Ms. Dinelle establish may be summarized as follows.

34. The paragraph with respect to intellectual property was inserted without the request or knowledge of Dr. Sattar or Dr. Springthorpe. The insertion occurred because a new employee of HRS chose the wrong standard form contract to send to Ms. Sabbah. The employee made the same mistake with respect to nine other individuals. When the mistake was recognized, Dr. Sattar, Dr. Springthorpe and Ms. Dinelle each made apologies directly to Ms. Sabbah. Dr. Sattar also repeatedly recognized Ms. Sabbah's role in the development of the universal neutralizer. He did note, and Ms. Sabbah accepted, that the original idea was his. He also noted that Ms. Sabbah's work on the universal neutralizer had been done in his lab and under his supervision,

and that it had built upon the previous work, albeit unsuccessful, of earlier graduate students. He gave Ms. Sabbah repeated, specific, written assurances that any intellectual property rights she had in the universal neutralizer would be honoured, including listing her as a co-inventor in a patent application which was submitted.

35. For completeness, I note that a contract dated April 14, 2010 was also generated by HRS for Ms. Sabbah for the period April 1, 2010 to June 30, 2010. Like the April 6, 2010 contract, it did not contain the IP clause.

36. In these circumstances is Ms. Sabbah entitled to termination pay?

37. The University argues that it was everyone's intention that Ms. Sabbah's employment continue beyond the end of March. It points to the emails from Dr. Sattar dated March 26, 2010 and to the emails of March 29 and 30, 2010 in which Ms. Sabbah confirms her intention to work until the end of April 2010. It argues that the test for constructive dismissal is an objective one. It states that a mistake was made with respect to the March 23, 2010 contract sent to Ms. Sabbah. It argues that had the contract not been sent, things would have simply continued as before: Ms. Sabbah would have continued to work.

38. The difficulty with this argument is that the March 23, 2010 contract was sent to Ms. Sabbah and the end result is that she did not continue to work past March 31, 2010.

39. The University argues whether there has been a constructive dismissal must be determined on an objective basis. I agree. The University argues the inclusion of the IP clause was a mistake. I agree. The University argues that as a result the IP clause should be ignored. I disagree.

40. The objective facts are that Ms. Sabbah had no reason not to believe that the March 23, 2010 contract she received on or about March 26, 2010 represented the terms and conditions under which the University was prepared to continue to employ her, not just to March 31, 2010 but, given her experience of continued employment after the expiry of her initial written contract of employment, beyond. The inclusion of the IP clause was a change in a fundamental term and condition of her employment. (It is also arguable that the attempt to revert back to fixed term contracts was also a change in a fundamental term and condition of her employment.) Dr. Sattar initially suggested to Dr. Springthorpe that Ms. Sabbah could continue to work without signing the new contract. There was no evidence, however, that this was conveyed to Ms. Sabbah. Dr. Sattar, through Dr. Springthorpe, also sought clarification from HRS on March 30, 2010 as to why the IP clause had been inserted. This clarification, however, was not forthcoming in a timely way. In any event, on April 1, 2010, Dr. Sattar confirmed to Ms. Sabbah what Ms. Sabbah understood to be the case: if she wished to continue to work for the University after March 31, 2010, she had to sign the March 23, 2010 contract. He conveyed the same message to her again on April 2 and 4, 2010. Ms. Sabbah refused to sign the contract. Accordingly on April 4, 2010, Dr. Sattar also advised Ms. Sabbah that as a result he would advise the University that her employment was terminated. He did so on April 6, 2010. As of the time that Ms. Sabbah's

employment was terminated for her refusal to sign the March 23, 2010 contract, she did not know that the IP clause had been included in error (nor, for that matter, did Dr. Sattar).

41. Ms. Sabbah refused to accept the fundamental change to the terms and conditions of her employment. Apart from her statements, she manifested this refusal by declining to work past March 31, 2010. She was, therefore, constructively dismissed as of that date. Alternatively, Ms. Sabbah's employment was terminated by Dr. Sattar on or before April 4, 2010 for refusal to sign the March 23, 2010 contract. In either event, on an objective analysis of the facts known to Ms. Sabbah and Dr. Sattar at the time, Ms. Sabbah's employment was terminated before either of them knew or should have known that the insertion of the IP clause into the contract of employment was in error.

42. I suggest no impropriety on Dr. Sattar's part. Quite the contrary. He had no control over or prior knowledge of the contents of the contract of employment between the University and Ms. Sabbah. He acted as expeditiously as reasonably possible to seek clarification from HRS. In advising Ms. Sabbah that her employment had come to an end, he was acting upon the understandable, albeit mistaken, belief that the March 23, 2010 document represented a new contract imposed upon Ms. Sabbah by the University.

43. Does the fact that Ms. Sabbah was advised on April 6 or April 7, 2010 that the inclusion of the IP clause was a mistake change the result? In my view it does not. For the reasons stated above, Ms. Sabbah's employment had already been terminated. I accept that an objective review of the emails on April 6 or shortly thereafter would or should have satisfied Ms. Sabbah that the inclusion of the IP clause was a mistake. There is also no question the University was then offering to continue to employ Ms. Sabbah under a contract that did not include the IP clause. It may well be that Ms. Sabbah acting reasonably should have accepted that offer of employment. However it is well established that there is no duty to mitigate with respect to termination pay under the Act. Accordingly, Ms. Sabbah was entitled to decline this offer of continued employment and claim her termination pay instead.

44. Ms. Sabbah was employed for 13 months. Accordingly, she was entitled to two weeks notice or termination pay in lieu. Ms. Sabbah was paid a salary of $28,000 per year. Her regular pay would have been $538.46 per week. Accordingly, I calculate two weeks termination pay to be $1,076.92. Vacation pay of 4% is owed on this amount, for a total of $1,120.

Overtime Pay

45. Ms. Sabbah filed a complaint with the Ministry of Labour on May 7, 2010 seeking overtime pay in addition to termination pay. There is no dispute that this was the first time that Ms. Sabbah in any way made a claim for overtime.

46. Ms. Sabbah's regular hours of work were 30 hours per week. She testified that she worked in excess of her regular hours of work on almost a weekly basis, stating that 30 hours per week was not enough for all of the work that she was doing. She filed a chart setting out the number of hours in excess of 30 she claims to have worked in each week of her employment by

the University. That chart shows anywhere from 0 to 22 extra hours worked per week. She testified that she made the chart based on notations she had made on a calendar as to when she had to go into the lab on a given day. She had not, however, noted on her calendar when she returned from the lab or how long she spent in the lab. She was just focused on the work, not keeping track of how much time she spent doing it. She testified that the chart was an after the fact attempt by her to estimate the number of hours which she had worked. It was created after she filed her claim with the Ministry of Labour. She agreed that she had never sought or received prior authorization to work overtime hours. In part, in her view, this was a product of a "silent agreement" which she had with Dr. Sattar: she would finish work on the neutralizer and they would get a patent for it. In part it was because she knew that funding was tight and overtime would not be authorized.

47. Dr. Sattar testified fairly and candidly that Ms. Sabbah probably could not accomplish the work assigned to her in 30 hours per week. The nature of the work in his lab is such that it does not lend itself to "9 to 5" hours. Employees are expected to be flexible. He noted that Ms. Sabbah had made use of that flexibility to accommodate various family obligations to take time off. Nonetheless, he did not doubt that Ms. Sabbah had worked extra hours. He noted that was the nature of the work: the writing of manuscripts takes extra time and researchers take work home. In Ms. Sabbah's case, she took on writing up the universal neutralizer project. She had, however, never raised the issue with him prior to her claim following the termination of her employment. He did not contradict Ms. Sabbah's evidence that overtime would not have been authorized if requested. Rather, he testified that he had paid overtime to employees only twice over the years, and that was in special cases in which the employee had worked 30 days straight on a special project and funding was available.

48. Dr. Springthorpe testified that she thought Ms. Sabbah could have accomplished her assigned work within 30 hours per week, but that she did not know. Ms. Sabbah did not work 9 to 5. Dr. Springthorpe was not working with Ms. Sabbah and saw her irregularly. She did not keep track of Ms. Sabbah's hours.

49. Ms. Dinelle testified that the University followed its policy with respect to overtime (discussed further below). Overtime is only paid if authorized. She stated staff that work in a particular lab usually know at the outset whether the lab supervisor will authorize overtime, because the ability to do so is strictly limited by the funds available to the lab.

50. In short, Ms. Sabbah's evidence was that she worked more than 30 hours per week, Dr. Sattar agreed that Ms. Sabbah probably could not complete her assigned work in 30 hours and had no reason to doubt that she worked more than 30 hours per week and Dr. Springthorpe had no direct knowledge of the number of hours worked by Ms. Sabbah. I conclude that Ms. Sabbah sometimes worked more than 30 hours per week.

51. Ms. Sabbah seeks overtime for hours worked in excess of 30 hours per week based upon the University's policies. The University has a policy with respect to "Work Hours, Overtime and Additional Work – Support Staff" which was filed as an exhibit (the "Policy"). There is no dispute that the Policy applied to Ms. Sabbah's employment. The Policy recognizes

that employees may work "flex time". It provides that overtime is paid on the basis of the hourly rate of the position occupied by the employee for hours in excess of the employee's regular hours of work. Each hour is to be paid at a rate of time and one half the regular hourly rate, either in money or equivalent time off. A maximum of 50 hours of overtime can be banked.

52. In my view, however, Ms. Sabbah has no entitlement under the Policy. Paragraph 15 of the Policy provides in pertinent part:

> Only overtime hours explicitly and directly scheduled and approved by the immediate supervisor are considered legitimate overtime hours and can be paid under the terms and conditions in this policy. .... Unscheduled and unauthorized hours of work by staff at their own discretion or for personal reasons are not recognized and are not paid as overtime under this policy.

There is no dispute that any overtime hours worked by Ms. Sabbah were not authorized. Accordingly, she has no entitlement under the Policy.

53. Ms. Sabbah's entitlement to be paid for the hours she worked in excess of 30 hours per week, if any, therefore, arises from the Act. In general, and sufficient for this decision, the Act distinguishes between hours worked in excess of 44 per week, and those worked up to 44 per week. Accordingly, they need to be separately considered.

54. For the purposes of the analysis, I also note the following. There was no clear evidence before me as to the pay period established by the University. Accordingly, I will treat each week shown in Ms. Sabbah's chart as a separate pay period. Ms. Sabbah was paid an annual salary of $28,000. This is the equivalent of $538.50 per weekly pay period. There is no dispute that she was paid this amount.

Hours Worked Up to 44 per Week

55. Under the terms of her contract Ms. Sabbah's "work schedule" is shown as "30 hours per week" and she was paid an annual salary of $28,000 per year. I have found that in some weeks she worked more than 30 hours. She did not receive any additional financial compensation for those hours. Did she receive the employment standard or a greater contractual benefit than the employment standard in relation to hours worked in excess of 30 hours per week, but not in excess of 44 hours per week? In my view the answer to this question requires determining whether she was a salaried employee in substance as well as form or whether she was in fact an hourly paid employee. The distinction is important for the purposes of the Act for the following reason: hourly paid employees are entitled to be paid straight time for all hours worked up to 44; salaried employees are only entitled to receive their salary irrespective of the number of hours worked up to 44.

56. The term salary is of ancient pedigree. Historically, it referred to a periodic payment of a fixed sum for services rendered by a person of the "higher class" By contrast, a person of

the "lower class" was paid wages for hours worked. The flavour of this distinction is captured in *Fahlman v. Independent Northern Laboratories Ltd.*, [1971] S.J. No. 72 (Sask. Q.B.):

> 5. .... The nature of the remuneration is evidence of the nature of the employment. This feature was dealt with by McCardie, J. in Moriarty v. Regent's Garage Company [1921] 1 K.B. 423 at pp. 444-5:
>
> "The Act of 1870 therefore treated 'salary' in the definition clause as one if its subject matters. The Act has been applied in the widest possible manner, as is shown in the authorities collected in *Chitty's Statutes*, vol. i., pp. 393-4. Now comes the question what is a 'salary'? I agree that the word is difficult to define. I may refer to two statutory provisions, the first in s. 33 of the *Bankruptcy Act, 1914*, which provides for preferential payments in bankruptcy. Many decisions have been given on that section or the similar section in previous statutes, but those cases must all be read in the light of the words used in the section, 'the wages or salary of any clerk or servant'; and therefore it is not enough for a man who seeks preferential proof in bankruptcy to say that he received a salary; he must go further, and show that he was a clerk or servant within the meaning of the section. It is important to remember this in considering the decisions on that section. The other statutory provision dealing with salaries is what is now s. 209 of the *Companies (Consolidation) Act, 1908*. There, the words are the same as those in s. 33 of the *Bankruptcy Act, 1914*, and the same observation therefore applies to the decisions on s. 209. While I agree as to the difficulty of defining the word 'salary' we must arrive at a general notion of its meaning, although even then it may be difficult to mark the point where 'salary' merges into 'wages,' or when the particular form of payment ceases to be 'salary' in the general sense of the word. In *Stroud's Judicial Dictionary* under the word 'salary' there is this quotation from *Termes de la Ley*: "Salarie' is a word often used in our bookes, and it signifies a recompense or consideration given unto any man for his paines bestowed upon another man's businesse.' That was the old and broad meaning. It has undoubtedly now acquired a narrower signification, which is well suggested in the ordinary dictionary definition. I take the following definition of 'salary' from the Imperial Dictionary: 'The recompense or consideration stipulated to be paid to a person periodically for services, usually a fixed sum to be paid by the year, half year, or quarter. When paid at shorter periods the recompense is usually called pay or wages; thus, a judge, governor, or teacher receives a salary; a labourer receives wages.' That dictionary meaning is in accordance with the judicial view so far as expressed upon the matter. In *Gordon v. Jennings* (1882), 51 L.J. (Q.B.) 417, 418, where the question was as to the meaning of the word 'wages' in the *Wages Attachment Abolition Act, 1870*, Grove J. said: 'In the first place the word 'wages' is some indication of the object of the Act - for though it might be said to include payment for any services, in general the word 'salary' is used for payment of services of a higher class, and 'wages' is confined to the earnings of labourers and artisans.' That I think gives the broad notion of the generally prevailing meaning. The same view has been taken in New Zealand, for I find in *Bedwell's Australasian Judicial Dictionary*, under the word 'salary,' a useful extract from the judgment

> of Williams A.C.J. *In re Industrial Conciliation and Arbitration Act, 1908* (1909), 28 N.Z.L.R. 933, 540: 'The term 'salary' is ordinarily used to signify the periodical remuneration paid to professional men, clerks, or persons whose duty it is to superintend, and who have in every case an appointment of some permanency. It is never ordinarily used as signifying the remuneration of manual labour or of any labour when the element of permanency is absent.'"
>
> ....
>
> 7. The test to be applied in order to ascertain the class to which the employee belongs was stated by Buckley, L.J. in *Simmons v. Heath Laundry Co*. [1910] L.J.K.B. 395 at p. 400:
>
> "I do not know whether it is possible to approach more closely to an answer to the question as to what is a contract of service under this Act than to say that in each case the question to be asked is, What was the man employed to do? Was he employed upon the terms that he should within the scope of his employment obey his master's orders, or was he employed to exercise his skill and achieve an indicated result in such manner as in his judgment was most likely to ensure success."
>
> 8. This statement was quoted by Turgeon, J.A. in the Cassidy case, supra, at p. 646, to which he added these remarks:
>
> "In the first case the relationship of master and servant exists and the man is a 'workman' within the meaning of the Act; (*The Workmen's Compensation Act*) in the second case he is not."

57. In modern usage, a salary remains a fixed periodic payment for services rendered. In most other respects, however, the application of the term has evolved. The period of payment is more likely to be weekly or bi-weekly than by the "year, half year, or quarter" Recipients of salaries are no longer limited to those of the "higher class" Perhaps more significantly, as in this case, "regular hours" for a salaried position are now often specified. This begs the following question: how does an employee who is paid a salary of $700 for a regular work week of 35 hours differ from an employee who is paid $20/hour and regularly works 35 hours per week?

58. Put differently, the nature of the remuneration is no longer determinative of the nature of the employment. Other characteristics are important in determining whether an employee is in substance salaried rather than hourly. The most obvious would appear to be whether there is a variation in the compensation paid for the period if there is a variation in the number of hours actually worked in the period. A decrease in compensation for a period in which a "salaried" employee works *less* than the specified number of regular hours may suggest that the person is really being paid something akin to an hourly basis. On the other hand, what if a "salaried" employee who works *more* than the specified number of regular hours receives or may receive an increase in compensation for the period? Does that mean that they are in fact an hourly employee? It is not uncommon for employers to have policies, similar to that of the University in this case, which in some circumstances result in premium pay or banked hours for hours worked in excess of the employee's regular hours. These could be construed as recognizing the

hourly nature of such employment. It would seem perverse, however, if an agreement to pay a premium for authorized hours would create an obligation to pay straight time for unauthorized hours which, as discussed below, would be the implication of concluding that the employee was really being paid on an hourly basis.

59. Other questions arise in relation to the modern salaried employee. For example, what if the employee usually works more than the "regular" number of hours, as Ms. Sabbah alleged in this case? Should that, somehow, affect the determination of whether or not the individual is a salaried employee, or is the individual's recourse to allege that the "regular hours" constitute a contractual term and seek some form of remedy for breach of contract?

60. These are not easy questions and not ones which were addressed by the parties to the proceeding before me. There was, however, no dispute that Ms. Sabbah received a "salary" which did not vary by pay period. I note also that Dr. Sattar's evidence was that there were some weeks in which Ms. Sabbah worked less than her normal 30 hours per week. This was not inconsistent with Ms. Sabbah's own chart which records 5 weeks in which she worked "0" hours in "excess" of her normal hours. Accordingly, based on the evidence before me, I find that Ms. Sabbah was a "salaried" employee. Accordingly, she received what she was entitled to receive under her contract for hours worked up to 44 per week. Did she receive the minimum amount required by the Act?

61. Section 11(1) requires an employer to "establish a recurring pay period and a recurring pay day" and to pay an employee "all wages earned during each pay period" The meaning of "wages" is defined in section 1. For the purposes of this decision it suffices to note that its meaning includes "monetary remuneration payable by an employer to an employee under the terms of an employment contract, oral or written, express or implied"

62. Payment of compensation to employees by way of salary is contemplated by the Act. Section 15 imposes different record keeping requirements with respect to salaried employees. Section 15 provides in relevant part:

> (1) An employer shall record the following information with respect to each employee, including an employee who is a homeworker:
>
> ....
>
> 4. The number of hours the employee worked in each day and each week.
>
> (3) An employer is not required to record the information described in paragraph 4 of subsection (1) with respect to an employee who is paid a salary if,
>
> (a) the employer records the number of hours in excess of those in his or her regular work week and,
>
> (i) the number of hours in excess of eight that the employee worked in each day, or

> (ii) if the number of hours in the employee's regular work day is more than eight hours, the number in excess;
>
> ....
>
> (4) An employee is considered to be paid a salary for the purposes of subsection (3) if,
>
> (a) the employee is entitled to be paid a fixed amount for each pay period; and
>
> (b) the amount actually paid for each pay period does not vary according to the number of hours worked by the employee, unless he or she works more than 44 hours in a week.

The meaning ascribed to salary by s. 15(4) is expressly stated to be for the purposes of s. 15(3). There is no general definition of the word "salary" in the Act. In fact, section 15 is the only place in the Act where there is an express reference to "salary" at all.

63. Section 1 defines "regular rate" as follows:

> "regular rate" means, subject to any regulation made under paragraph 10 of subsection 141 (1),
>
> (a) for an employee who is paid by the hour, the amount earned for an hour of work in the employee's usual work week, not counting overtime hours,
>
> (b) otherwise, the amount earned in a given work week divided by the number of non-overtime hours actually worked in that week;

64. The effect of the definition of "regular rate" is to convert the compensation paid to salaried employees into an hourly rate calculated by reference to the number of non-overtime hours actually worked by an employee in a given week. Notably, it is not calculated by reference to the normal number of hours to be worked by employee pursuant to his or her contract. This "regular rate" is then used in the Act for the purposes of determining: entitlement to overtime pay (see section 22); entitlement to public holiday pay (see sections 24, 27, 28 and 30); and whether an employee has been laid off in a week for the purposes of the termination pay and severance pay provisions of the Act (see sections 56 and 63 respectively).

65. Nothing in the Act entitles a salaried employee to receive additional compensation for hours actually worked in a week which exceed his or her normal hours but are less than 44 hours in a week. Rather, as implicit in the definition of regular rate, the amount of regular compensation such an employee is entitled to receive remains constant while the employee's regular rate for the week declines proportionate to the increase in the number of non-overtime hours actually worked.

66. The only employment standard which applies to the amount of compensation paid to salaried employees in relation to the first 44 hours worked in a week is the obligation to pay at

least the prescribed minimum wage found in Part IX of the Act, which consists only of section 23. Section 23 provides, in relevant part, as follows:

> (1) An employer shall pay employees at least the prescribed minimum wage.
>
> ....
>
> (3) Compliance with this Part shall be determined on a pay period basis.
>
> (4) Without restricting the generality of subsection (3), if the prescribed minimum wage applicable with respect to an employee is expressed as an hourly rate, the employer shall not be considered to have complied with this Part unless,
>
> (a) when the amount of regular wages paid to the employee in the pay period is divided by the number of hours he or she worked in the pay period, other than hours for which the employee was entitled to receive overtime pay or premium pay, the quotient is at least equal to the prescribed minimum wage; and
>
> (b) when the amount of overtime pay and premium pay paid to the employee in the pay period is divided by the number of hours worked in the pay period for which the employee was entitled to receive overtime pay or premium pay, the quotient is at least equal to one and one half times the prescribed minimum wage.

67. The prescribed minimum wage applicable to Ms. Sabbah's employment for the period May 7, 2009 to March 30, 2010 was $9.50 per hour: see O. Reg. 285/01 s. 5(1.2), para. 5. While Ms. Sabbah's employment terminated effective April 1, 2010, the evidence before me was that she did not work on March 31, 2010. Accordingly, the applicable minimum wage at all material times was $9.50 per hour.

68. The first 44 hours worked by Ms. Sabbah in any weekly pay period were subject to section 23(4)(a). Her regular wages for each of these pay periods was $538.50. If that number is divided by 44 hours, the result is $12.24/hour. This exceeds the minimum wage of $9.50/hour. Accordingly, the employer has complied with the requirement of section 23(4)(a).

Hours Worked in Excess of 44 per Week

69. Pursuant to the University's Policy, which formed part of Ms. Sabbah's contract of employment, she was entitled to receive a premium for authorized hours worked in excess of her normal 30 hours per week. Pursuant to the Act, she would, in essence, be entitled to receive time and a half for all hours worked in excess of 44 in a week: see Part VIII of the Act, and in particular sections 22, 22.1 and 22.2. Further, this amount must be at least one and a half times the minimum wage: see Part IX of the Act, section 23. Does the Policy or the Act apply to Ms. Sabbah's claim for overtime?

70. Section 5(2) provides:

> If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a

> greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.

In *United Food and Commercial Workers Union, Local 1977 v. Zehr's Markets, a Division of Zehrmarket Ltd.*, [2009] O.L.A.A. No. 63, Arbitrator Albertyn adopted a two step approach to making the determination under section 5(2). This approach was affirmed by the Divisional Court in dismissing an application for judicial review: [2010] O.J. No. 13. The first step is a global comparison of the general overall provisions in relation to the subject matter in the contract with those in the Act. However, since section 5(2) requires that the greater benefit be provided to "an employee", consideration must be given to the application of the contract on an individual basis. Thus, as a second step, one must consider whether the application of those contractual provisions results in a greater benefit to the employee in question.

71. With respect to the first step, the Policy requires explicit approval of overtime hours in order to attract a premium. By contrast, work in fact performed by an employee, even though not authorized by the employer, is work for the purposes of Act: see O. Reg. 285/01 s. 6(1)(a)(ii). On the other hand, under the Policy entitlement to premium compensatory time-off or pay arises after specified normal work weeks. The Policy discusses an average normal work week of 35 hours for support staff and an average normal work week of 40 hours for staff of "Protection Services" and the "Housekeeping Division of the Physical Resources Services" In both cases the number of hours in the average normal work week is less than the 44 hour threshold for overtime pay established by section 22 of the Act. If the comparison were restricted to balancing of just these two factors, it is at least arguable that on a global comparison basis the Policy provides a greater benefit than the employment standards with respect to pay for regular and overtime hours. On the view I take of this matter, however, I do not need to decide that issue.

72. Assuming without deciding on a global comparison basis the Policy does provide a greater benefit than the comparable employment standards, I am not satisfied that the Policy provided a greater benefit as applied to Ms. Sabbah. It is true that Ms. Sabbah's regular hours were 30 hours per week. The Policy, therefore, would result in a premium to her in relation to all authorized hours worked in excess of 30. This is a substantial advantage over the 44 hour threshold set out in the Act. If there were some reasonable prospect that some of the hours worked by Ms. Sabbah in excess of her regular 30 hours would be authorized then I might conclude that application of the Policy to her resulted in a greater contractual benefit, even if she received no premium compensation with respect to other hours worked but not authorized. But on the evidence before me I conclude both that it was expected that Ms. Sabbah would work more than her regular 30 hours and that there was in essence no prospect that any of those hours would be explicitly authorized or scheduled as overtime hours. Accordingly, I conclude that the Policy as applied to Ms. Sabbah did not provide her with a greater benefit than the employment standards with respect to the same subject matter.

73. In the result, section 5(2) does not operate to bar the application of the relevant employment standards to Ms. Sabbah's employment. I turn now to consider those employment standards.

74. As noted, Part VIII deals with overtime pay. Section 22(1) provides:

> An employer shall pay an employee overtime pay of at least one and one-half times his or her regular rate for each hour of work in excess of 44 hours in each week or, if another threshold is prescribed, that prescribed threshold.

75. As noted above, "regular rate" is defined by section 1:

> "regular rate" means, subject to any regulation made under paragraph 10 of subsection 141 (1),
>
> (a) for an employee who is paid by the hour, the amount earned for an hour of work in the employee's usual work week, not counting overtime hours,
>
> (b) otherwise, the amount earned in a given work week divided by the number of non-overtime hours actually worked in that week;

Since I have concluded that Ms. Sabbah is not paid by the hour but rather is a salaried employee, the applicable clause is (b). For each hour worked in excess of 44 in a week (i.e. her overtime hours), she is entitled to one and one-half times her weekly salary ($538.50) divided by the number of non-overtime hours actually worked (44). That is she is entitled to $18.36 per overtime hour worked.

76. The difficulty is in determining the number of hours worked. While Ms. Sabbah's chart does record many weeks in which she worked more than her regular 30 hours, given the after-the-fact manner in which the chart was created there are obvious concerns with the reliability of the numbers. While I am prepared to conclude that Ms. Sabbah worked in excess of 30 hours some weeks, I am not prepared to conclude that she worked in excess of 44 hours in any week. Accordingly, she has no entitlement to overtime pay.

Disposition

77. For the reasons stated, I find that Ms. Sabbah is entitled to: $1,120 representing two weeks termination pay and vacation pay thereon. The University of Ottawa is to pay this amount to the Director of Employment Standards in trust for Safaa Sabbah. If this amount is not paid within 30 calendar days of the date of this decision, this decision will become an order to pay in favour of the Director of Employment Standards in trust for Safaa Sabbah, attracting the statutory administrative fee of $112.00. The total amount of the order to pay will be $1,232. In addition, pursuant to section 119(12) of the Act, I direct that if this decision becomes an order to pay, then interest will be payable at the rate and calculated in the manner determined by the Director under subsection 88(5) of the Act.

3484-11-R UFCW Canada Local 1000A, Applicant v. **Sysco Fine Meats of Toronto, a Division of Sysco Canada, Inc.**, Responding Party.

3662-11-U UFCW Canada Local 1000A, Applicant v **Sysco Fine Meats of Toronto, a Division of Sysco Canada, Inc.**, Responding Party.

3815-11-U Sysco Fine Meats of Toronto, a Division of Sysco Canada, Inc., Applicant v UFCW Canada Local 1000A, Responding Party.

Bargaining Unit – Certification – Employer – The Board first determined that Sysco was the employer of the employees supplied to it by an employment agency for the purposes of the Act – The Board found that Sysco possessed the effective and fundamental control over matters dealing with training, discipline, evaluation, day-to-day supervision, assignment of duties and amount of remuneration – Additionally there was a high level of integration of the workers into Sysco's workplace – Sysco, possessing the greatest control over all aspects of the employment relationship, was the true employer – The Board went on to determine that excluding these temporary employees from the bargaining unit would not create serious labour relations problems for the employer, whereas including them in the unit would exacerbate the union's ability to represent these employees and weaken its negotiating position, particularly given the fragmentation in the workplace between the temporary and full-time employees – Certificate issued

DECISION OF VICE-CHAIR MAURICE A. GREEN AND BOARD MEMBER C. PHILLIPS:

APPEARANCES: *Ryan D. White*, *Don Taylor*, *Jonathan Lobo* appearing for UFCW Canada Local 1000A, *David Chondon, Jayson Rider, Paul Macchione, Beth Worthington, Sandi Young* appearing for Sysco Fine Meats of Toronto, a Division of Sysco Canada, Inc.

DECISION OF THE BOARD: February 25, 2013

1. This is an application for certification filed pursuant to section 7 the *Labour Relations Act, 1995,* S.O. 1995, c.1, as amended (the "Act"). The parties have also filed cross applications pursuant to section 96 of the Act. The parties agreed to first address two major issues arising from the certification application. Namely, whether Sysco Fine Meats ("Sysco") was the employer of approximately 14 individuals supplied to Sysco by Better Labour Inc., ("Better Labour"), an employment agency, and if so, what the appropriate bargaining unit description should be. When filing its application the UFCW Canada Local 1000A ("the union" or "UFCW") sought the exclusion of "temporary workers"

Background Facts

2. Sysco called as its witnesses Phurbu Tsering, Nima Wagdu, and Tipaporn Chinboot, who were hired by Better Labour and sent to work at Sysco, as well as Robert Taylor, President of Better Labour, Roger Boback, Sysco's Specialty Supervisor, and Sandi Young, Human Resources Manager Sysco Finance. The applicant called Jonathan Lobo Coordinator for UFCW Canada Local 1000A. The parties agree that the evidence called is applicable to both questions before the Board.

3. Sysco Fine Meats of Toronto, a Division of Sysco Canada, Inc., is located in Vaughan, Ontario. Prior to July 2011 Sysco Canada Inc., owned Honeyman's Beef Purveyors ("Honeyman's"), which was located in the West Mall, Etobicoke, Ontario, and J. J. Derma Meats, Torlake Crescent, Etobicoke, Ontario. J. J. Derma Meats was a unionized workplace. In September 2008 Better Labour came to the attention of Ms. Young, who at that time was Human Resources Manager of both Honeyman's and J. J. Derma Meats. In September 2008 Honeyman's had a "specialty products line" consisting of employees who prepared and packaged special orders for customers such as meat/chicken kebabs, bacon wrapped meat/chicken kebabs, and beef wellington products. The extent of orders for such products varied with the time of year, the busiest season being prior to the Christmas and New Year holidays. As a result of the seasonal need for staff, Honeyman's, and then Sysco Fine Meats, entered into a contract with Better Labour for the supply of agency personnel specifically for the "specialty products" group. At the time of the application for certification, being January 27, 2012, Better Labour supplied temporary workers to approximately 20 clients engaged, among other areas, in food production, the auto industry, and hospitality industry. When Sysco Fine Meats moved to its Vaughan location the specialty products group from Honeyman's was moved at the same time.

4. The evidence shows that Better Labour hires the personnel. Candidates are given a short English test, and if hired are provided with some basic hygiene training when working in food preparation, as well as basic safety training. For the most part the training was provided by way of a video, which Mr. Taylor had prepared. The employees are also given a copy of Sysco's Temporary Employees Handbook, which encompasses Sysco's employment rules and policies for the plant, including hygiene requirements. A Better Labour office employee highlights the main portions of Sysco's Handbook for the new temporary worker. As many of the personnel hired by Better Labour for Sysco are Tibetan immigrants, translation is made available by Better Labour staff, although Sysco's Handbook is only available in English. Better Labour explains to applicants that they will receive on the job training from Sysco. Better Labour is responsible for providing transportation for those hired to and from Sysco's plant in Vaughan, from downtown Toronto. If any agency employee wishes to drive to the plant they can do so, but as of the application date all but one availed themselves of Better Labour's transportation.

5. Sysco personnel provide on the job training to newly assigned temporary workers, as the work is uncomplicated requiring mostly basic use of kitchen knives and hand coordination skills. If full-time Sysco employees move to the specialty products line they receive the same on the job training as the temporary workers. Once they arrive at Sysco's plant, the Better Labour personnel use the same changing room as Sysco's employees and are under the direction and control of Sysco's specialty supervisor, Mr. Roger Boback. At the beginning of a shift Mr. Boback describes the work for the day, and how the work will be organized amongst the employees.

6. The specialty product group consists of approximately five full-time Sysco employees, and approximately fourteen temporary employees from Better Labour. The evidence shows that they work in an integrated fashion, although when preparing the more complex products Sysco full-time employees may perform the more difficult portions of the work, with Better Labour personnel performing the simpler tasks. Regardless, at all times it is Sysco's supervisor who has

direct control over the specialty group. Better Labour does not maintain any supervisory staff at Sysco. Whether full-time Sysco employees or Better Labour personnel, they take their breaks at the same time, and have access to the same location for such breaks and lunch, in addition to having the same shift times. All persons working on the specialty products line have to wear hairnets, safety boots, and a white coat. The only difference regarding clothing between full-time employees and Better Labour personnel is that Sysco supplies an under coat to its full-time employees, as they are working in a cool environment, whereas Better Labour personnel have to provide their own.

7. Better Labour personnel are paid bi-weekly once Mr. Boback has confirmed the hours worked, that are tracked by time sheets, and which are submitted to Sysco's manager for review, after which they are faxed to Better Labour. Better Labour calculates the total cost to Sysco and then remits its invoice to the company. Better Labour makes up the pay cheques for the temporary employees, after making the usual deductions for income tax, C.P.P. and E.I. Better Labour is also responsible for Workers Compensation coverage. The pay rate for temporary workers is negotiated as between Sysco and Better Labour with Better Labour adding an approximate 30% – 40% mark up, which includes allowance for statutory holiday and vacation pay, Workers Compensation coverage, general liability insurance coverage for Better Labour, and a profit margin for Better Labour. When it considers it justified Sysco will request Better Labour to increase the pay rate of a particularly good temporary worker. In the same vein, if Sysco is not happy with a particular temporary worker it simply requests Better Labour to not "send" the person, but to supply another employee, although the evidence shows this is not a common occurrence. Better Labour has no involvement in assessing the temporary workers it supplies to Sysco, but rather that function falls within Sysco's power. Finally, if a temporary worker needs time off work their request is made through Better Labour.

8. The contract between Sysco and Better Labour was drawn up by Sysco and according to Ms. Young contained standard provisions that the company places in such contracts for use with employment agencies. The evidence shows that Sysco effectively controls the wage rates to be paid, and Better Labour then adds its mark up and other employment obligations on top of the rate. As is common in such contracts it provides that Better Labour "shall recruit, interview, test, select, hire, and train the employees" who are provided to Sysco. Further that Better Labour "shall have sole responsibility to counsel, discipline, review, evaluate, set pay rates, terminate and control all other employment matters". The contract also provides that "employees shall remain under the direction and control" of Better Labour, and such employees "shall not be considered employees of" Sysco "for any purpose". As with so many of these type of cases the difference between the contractual form and actual day-to-day reality simply does not match.

9. The evidence also shows that the temporary workers are clearly correctly described as "temporary" Thus, of 30 workers supplied to Sysco by Better Labour between June 2011 through September 2011, 29 were no longer at Sysco on January 27, 2012, the application date, i.e. approximately six months later. In fact, when Better Labour's records are analyzed the average length of an individual's assignment at Sysco (with the exception of one longer term worker) is approximately 3.7 months.

Decision

10. The parties approached the issue of who is the true employer, for the purposes of the Act, in the traditional manner of relying upon the seven criteria enunciated in *York Condominium Corporation,* [1977] OLRB Rep. Oct. 645 at paragraph 10. Namely,

1. The party exercising direction and control over the employees performing the work;
2. The party bearing the burden of remuneration;
3. The party imposing discipline;
4. The party hiring employees;
5. The party with authority to dismiss the employees;
6. The party perceived to be the employer by the employees; and
7. The existence of an intention to create the relationship of employer and employee.

The parties additionally relied upon the application of those principles as found in *Nike Canada Ltd,* 2006 CanLII 24724 (ON L.R.B.), and *Puddy Brothers, A Division of Maple Lodge Farms Ltd.,* [2011] O.L.R.D. No. 3257. Both parties correctly observed that factors six and seven of the *York Condominium* case have generally been viewed as unhelpful, and it is true that one would be hard pressed to find a case where they played any part in the final conclusion. It is also reasonable to assume that in the vast majority of cases the party that has the power to impose discipline also has the authority to dismiss the employees. Thus, one is effectively reduced to four factors, with the ultimate question being capsulized by asking "which entity exercises fundamental control over the working lives of the individuals in issue", (*Sutton Place Hotel,* [1980] OLRB Rep. 1538 at paragraph 43).

11. However, the Board has recently re-visited the question of how it should analyze the issue of which entity should be viewed as the true employer – the agency or the corporate client of the agency to whom employees are provided. In *Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry v B.M. Metals Services Inc.* 2012 CanLII 63784 (ON LRB), the Board adopted the approach of the Supreme Court of Canada in *Point-Claire (City) v Quebec (Labour Court)* [1997] 1 SCR 1015, and provided the following observations concerning the Court's decision:

> 35. However, the Court did go on to set out what sort of analysis it viewed as being reasonable and what was not. The Court was critical of the analysis generally undertaken by the Quebec Labour Court. The Labour Court used what it called the "legal subordination" test, by which it meant a simple analysis of which party was in control of the day-to-day assignment and direction of work performed by the individual. The Supreme Court of Canada also referred critically to an exclusive reliance on what is called the

"integration" test, a term borrowed from cases where the issue was whether an individual was an independent contractor or employee (*671122 Ontario Ltd v Sagaz Industries Canada Inc.*, 2001 SCC 59 (CanLII), [2001] 2 SCR 983). The Court said explicitly that reliance on those simple tests was unlikely to lead to a reasonable result. It stated that a reasonable analysis undertook what is called a "more comprehensive approach". At paragraph 48 the Court said:

> According to this more comprehensive approach the legal subordination and integration into the business criteria should not be used as exclusive criteria for identifying the real employer. In my view, in a context of collective relations governed by the *Labour Code*, it is essential that temporary employees be able to bargain with the party that exercises the greatest control over all aspects of their work – and not only over the supervision of their day-to-day work. Moreover, when there is a certain splitting of the employer's identity in the context of a tripartite relationship, the more comprehensive and more flexible approach has the advantage of allowing for a consideration of which party has the most control over all aspects of the work on the specific facts of each case. Without drawing up an exhaustive list of factors pertaining to the employer-employee relationship, I shall mention the following examples: the selection process, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration and integration into the business.

12. The Board in *B.M. Metals Services Inc.* (*supra)* noted that the above analysis by the Supreme Court of Canada was adopted by the Superior Court of Justice and the Ontario Court of Appeal in *IBM Canada v Ontario (Minister of Finance)* [2007] OJ No. 273 (Campbell J.) and 2008 ONCA 216 (CanLII; leave to appeal to the Supreme Court of Canada denied [2008] SCCA No. 255).

13. Some may observe that the criteria or factors referred to by the Supreme Court of Canada cited above have an uncanny resemblance to some, but not all, of the factors established by *York Condominium*. However, the Board in *B.M. Metals Services Inc.* added that:

> 38. The analysis must also be purposive. This is an application for certification. As the Board asked in *Grant Development Corporation* "what choice appears to be more consistent with the statutory and labour relations framework within which the Board operates". There is little value in certifying a union to represent a group of employees, and then direct it to bargain with a party that has no substantial control of the employment relationship.
>
> 39. I conclude that the reference to the *York Condominium Corporation* decision is unhelpful. It is more useful to focus on the facts relevant to the kind of issues referred to in the Supreme Court of Canada's non-exhaustive list, that enable the Board to come to the conclusion that one party or the other exercises the most control over all aspects of the work of the employees in question.

14. The Board stresses that although it has modified its analytical approach to answering the fundamental question as to who is the true employer it does not follow that a finding that the entity to which the agency supplies temporary employees is the true employer automatically results in such employees being included in the bargaining unit. The appropriateness of a bargaining unit description is governed by different criteria.

15. In applying the tests enunciated by the Supreme Court of Canada to the facts in the instant application it is apparent that Sysco possesses the effective and fundamental control over matters dealing with training, discipline, evaluation, day-to-day supervision, assignment of duties, and amount of remuneration, and most importantly the actual number of temporary workers that will be hired from time to time from Better Labour. Further, there is a high level of integration of the temporary workers into Sysco's workplace. In that sense there is a strong parallel, and similarity, to the findings the Board made in *Puddy Brothers* (supra) paragraphs 22 –30. That leaves Better Labour only having effective and fundamental control over the initial selection and hiring of such temporary workers; transporting the employees to and from Sysco's plant; and payment of wages, which however are effectively established by Sysco.

16. To suggest that Better Labour is therefore the true employer is unrealistic, as apart from the foregoing findings, Sysco, being the instigator in engaging the employment agency, clearly possesses "the greatest control over all aspects" of the employment relationship. Therefore, the Board finds that Sysco is the real or true employer of the temporary employees. Although, given the evidence in the instant case, the same conclusion would have been reached if the *York Condominium* criteria had been applied, the revised approach of the Board brings a greater degree of labour relations practicality to the issues.

Appropriate Bargaining Unit Description

17. As stated above, simply because Sysco is found to be the true employer of the temporary employees does not automatically result in them being included in the bargaining unit. The responding party argued strenuously that there was a strong community of interest amongst both Sysco's full-time employees and the temporary employees as they were, *inter alia,* performing the same work, well integrated into the workplace by working under the same work rules and governed by the same policies (such as the hygiene, harassment, and safety policies). Further, the temporary workers made up approximately 18% of the meat processing unit the union was seeking to represent, being a substantial number. To not include the temporary employees, the employer argued, would lead to an unacceptable fragmentation.

18. Further, Sysco discounted the union's evidence that to include such employees creates difficulties for the union in organizing the temporary workers, especially as regards access (mainly due to Better Labour transporting the temporary workers to and from Sysco's plant), and the language barriers faced by many of the temporary workers. In this regard the responding party basically asserted that the union must take the unit as it finds it, a principle that some previous decisions have noted.

19. The responding party relied upon the long accepted principles regarding the appropriateness of the bargaining unit as applied in *Transfreight Integrated Logistics Inc.*, [2009] O.L.R.D. No. 2668; *Metroland Printing, Publishing and Distributing Ltd.*, [2003] OLRB Rep. January/February 104; *Swift Railroad Contractors Corp.*, [2011] 196 C.L.R.B.R. (2d) 73; *Amalgamated Meat Cutters and Butcher Workmen of North America v Paris Poultry Products Limited,* 1978 CanLII 561 (ON LRB); and *Hudson's Bay Co.*, [2010] O.L.R.D. No. 10., as well as a number of cases addressing the same issues from the British Columbia Labour Relations Board.

20. As the applicant correctly observed, in none of the cases cited by Sysco was the Board faced with the question of whether temporary employees supplied by an agency were appropriate to be included in the bargaining unit in face of the union's desire, as evidenced by its application, to have them excluded. Thus, such cases are neither determinative, nor helpful, in the instant case. Further, as was argued by the applicant, reference and reliance upon the British Columbia Labour Relations Board cases is unhelpful as not only do they not address the situation and problems potentially created by including agency employees in an "all employee unit", they also represent a different policy to that of the Ontario Board, when considering and balancing the normal criteria it relies upon in deciding the appropriateness of the bargaining unit description.

21. As was stated in *Active Mold Plastic Products Ltd.*, [1994] OLRB Rep. June 617, quoting from *Hospital for Sick Children* [1985] OLRB Rep. Feb. 266 paragraph 23:

> 23. We are troubled by the fact that a largely administrative and policy laden determination has mushroomed in some cases into an elaborate, expensive, and time-consuming process for deciding a relatively simple question: does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.

22. The Board in *Active Mold Plastics Products Ltd,* (*supra* at paragraph 27) went on to observe that:

> Should the unit requested by the applicant satisfy this standard, the unit will be granted by the Board. It is unnecessary to consider, in those circumstances, any alternative bargaining unit configuration, as the Board's function is to determine only whether the unit requested by the applicant is "an" appropriate unit. Comparative assessments of possible bargaining unit descriptions is unnecessary.

23. Those principles are as applicable today as they were in 1994. Along similar lines the Board in *The Niagara Parks Commission* [1995] OLRB Rep. March 363, stated that:

> 45. The concern for fragmentation, however, does not lead automatically to the selection of the largest viable unit. The Board has regularly commented that the ACT compels applicants for certification to seek AN appropriate unit,

> not the MOST appropriate unit. Other factors compete with the concern for fragmentation – most obviously, the concern for employee access to collective bargaining. Although a particular unit might appear MORE or MOST appropriate, the Board will prefer another appropriate unit where it finds its concern for employee access to collective bargaining outweighs the potential for serious labour relations problems (including fragmentation).

Again, those principles are as relevant today as they were in 1995, and facilitation of a union's ability to organize, and employees to gain access to collective bargaining, have always been factors that the Board has taken into account in appropriate situations. Thus, an optimal bargaining unit description does not necessarily prevail.

24. The practical reality facing both Sysco and the union is that if the temporary employees remain outside of the unit, as requested by the applicant, then the parties will no doubt bargain over the extent and use, if any, of agency employees by Sysco. Conversely, if the temporary employees are included within the bargaining unit then similarly the parties will almost inevitably bargain over the extent and use, if any, of agency employees. In either situation, the parties will be faced with almost exactly the same concerns. To conclude, therefore, that exclusion only creates serious labour relations problems for the employer is simply not tenable. Further, if such temporary employees were included in the unit the problems then faced by the union may well be exacerbated as it is governed by the duty of fair representation, which in the circumstances may well create both legal and practical problems that most definitely would weaken its negotiating options, leading to a less viable unit. Such a result may well suit an employer, but that is one major reason why the Board should place greater emphasis on the fact that the applicant specifically excluded temporary employees in its application, a factor that most definitely differentiates the instant case from *Puddy Brothers* (*supra*).

25. It is true that the union's evidence concerning its difficulty in accessing the temporary employees is not particularly strong. Although it faced major problems at Sysco's site, as well as facing the reality that most of the temporary workers were of Tibetan origin, it may have been feasible to arrange for the use of an interpreter, and with much footwork figured out a way of speaking to them away from Sysco's property. However, that is not a reason to force such temporary employees upon the union when the far greater concern is how the union is to practically negotiate for the larger unit, given its duty of fair representation, as well as the ongoing problem of not having Better Labour at the negotiating table. Of interest and relevance to the Board's conclusion is the fact that when the responding party was asked whether it would continue to utilize Better Labour even if the Board found Sysco to be the true employer, or rather would be willing to hire such temporary employees itself, it was unable to provide an answer. This simply confirms that Sysco wishes to continue to maintain its clear economic advantage in utilizing agency employees, which clearly is its right to do. However, as the applicant noted, it is the responding party that has effectively created the fragmentation one finds in this particular workplace, and therefore Sysco cannot then attempt to force the union to accept a bargaining unit that it considers optimal.

26. Further, given the relatively weak attachment such agency/temporary workers have to Sysco due to their average length of assignment (approximately 3.7 months excluding one longer term individual) it is far less credible to suggest that excluding them would create serious labour relations problems for the employer and make the unit less viable, rather than including them. Put somewhat differently, the applicant's unit description simply "makes labour relations sense"

27. The Board therefore finds that the appropriate bargaining unit is "all employees of Sysco Fine Meats, located at 1400 Creditstone Road, Unit B, Vaughan, Ontario save and except supervisors, persons above the rank of supervisors, maintenance coordinator, office, clerical, and sales staff, any persons working in I.T. department, quality assurance/control personnel, customer service representatives (CSR), contract workers, and temporary employees"

28. On a taking of the representation vote directed by the Board, (which occurred on February 3, 2012), more than 50% of the ballots cast by employees in the bargaining unit were cast in favour of the applicant.

29. A certificate will issue to the applicant.

30. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before then.

31. The parties shall advise the Registrar within 30 days following the date of this decision whether they wish their respective applications in Board File Nos: 3662-11-U, and 3815-11-U listed for hearing. The panel remains seized.

DECISION OF BOARD MEMBER P. LeMay: February 25, 2013

32. While I concur with the majority that Sysco is the employer of the temporary employees, I do not agree that the unit applied for is appropriate.

33. As the majority noted at paragraph 5, if full-time Sysco employees move to the specialty products line they receive the same on the job training as the temporary workers. And at paragraph 6, the specialty product group consists of approximately five full-time employees and approximately 14 temporary employees from Better Labour, and they work in an integrated fashion.

34. The evidence was that while the temporary employees had an average of 5.9 months' service, the longest serving one had 1,214 days' service. Further, at paragraph 15, the majority found a high level of integration of the temporary workers into Sysco's workplace.

35. Against this background, I do not agree that it is appropriate to exclude nearly 75% of the specialty product employees from the bargaining unit.

2171-12-R International Brotherhood of Electrical Workers, Local 636, Applicant v **Tamarack Tree Care Ltd.**, Responding Party.

Certification – The IBEW sought to certify a bargaining unit of employees engaged in pruning trees and clearing vegetation that could interfere with hydro lines passing over various property within Hydro Ottawa's service area – Tamarack sought to rely on the 1971 Court of Appeal decision in *Cedarvale Tree Services* that workers employed in pruning trees and tree and stump removal were engaged in "horticulture" and thus excluded from the Act – The Board distinguished *Cedarvale*, finding the nature of the two companies' business was very different: Tamarack's work was 95% line clearing (versus *Cedarvale's* 30%) and involved no arboriculture or cultivation – Tamarack did not hold itself out as a company that performs horticultural work, rather its employees were described as "utility arborists" – Adopting a purposive approach, the Board chose to look at the employer's primary business: Tamarack's primary business was not horticulture, nor were any of its employees engaged in horticulture – Certificate issued

BEFORE: Maurice A. Green, Vice-Chair.

APPEARANCES: *Ron Lebi, Bill Martindale, Brett Youngberg* and *Charles Goodwin* appearing for the Applicant; *Karen Sargent, Keri Bennett, Matthew M. Randi* and *Linda L. Randi* appearing for the Responding Party.

DECISION OF THE BOARD: January 9, 2013.

Overview

1. This is an application for certification, being dealt with under section 8 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"), that was filed on October 18, 2012. By a decision dated October 23, 2012, the Board confirmed that the applicant is a trade union within the meaning of section 1(1) of the Act, and ordered a vote of the applicant's proposed bargaining to be held October 25, 2012. The vote was held on such date, at which time more than 50% of the ballots cast by the employees voted in favour of the applicant being their collective bargaining representative. There were approximately 25 employees in the proposed bargaining unit on the application date.

2. In its response to the application for certification Tamarack Tree Care Ltd. ("Tamarack" or "the Company") adopted the position that no bargaining unit was appropriate as it claimed that its employees were not covered by the Act, due to section 3(c), which provides that:

> This Act does not apply,
>
> ....
>
> (c) to a person, other than an employee of a municipality or a person employed in silviculture, **who is employed in horticulture by**

> **an employer whose primary business is** agriculture or **horticulture**; [emphasis added].

More particularly, Tamarack claims that its primary business should be classified as "horticulture", and that all the employees encompassed by the application are engaged in horticulture. Tamarack's main customer, and contract, is with Hydro Ottawa Limited ("Hydro Ottawa"). The essence of the contract is that Tamarack "perform live line clearing services on all Work assigned by Hydro Ottawa..." The work of the Company and its employees, which will be described in greater detail below, is to basically prune all trees, and clear all vegetation, which would, or could, interfere with the hydro lines passing over residential, commercial/industrial and/or public property within Hydro Ottawa's service area.

3. Tamarack relies upon the 1971 decision of the Ontario Court of Appeal in *Cedarvale Trees Services Ltd and Labourers' International Union of North America, Local 183*, [1971] 3 O.R.832 ("the *Cedarvale case*"), which it submits is binding on this Board, as there was a finding that some 70% of the employees' time, in that case, was taken up by the pruning of trees, and stump and tree removal in similar circumstances to those existing in this application.

4. In brief, the applicant's position is that when characterizing the work performed by Tamarack and its employees, the Board should place the emphasis on the purpose of the work, which it describes as "incidentally about horticulture, but primarily about protecting the power lines from interference from trees", and that Tamarack is not in the "tree care business" as such. As will be dealt with below, the applicant submits that the Board is not bound by the *Cedarvale* case (*supra*).

5. Given the fact that the *Cedarvale* case is some 42 years old, and that the methods of performing the work in issue have altered somewhat over the years, as well as the terminology utilized in the industry, I believe it appropriate to set out in some detail the extensive evidence Tamarack placed before the Board.

The Evidence

6. Tamarack called Mr. Matthew M. Randi to testify about its operations. Mr. Randi holds the title of Business Developer and Strategy Advisor to the Company, with his partner Ms. Linda L. Randi being Tamarack's president. Tamarack is a wholly owned subsidiary of a U.S. company, Lewis Tree Service Inc, which employs some 3,600 employees in the U.S. Mr. Randi has been working for Tamarack for approximately 7 years, having been in the tree care business for some 25 years in the United States and Canada. Mr. Randi holds a certificate as an ISA (International Society of Arboriculture) arborist, as well as holding an ISA Utility Specialist certificate, which he described as equivalent to the provincial qualifications.

7. On its web site, Tamarack lists its qualifications and associations as being the ISA – International Society of Arboriculture-Canada; UAA – Utility Arborist Association; TCIA – Tree Care Industry Association; and EUSA – Electrical Utility Safety Association. Mr. Randi briefly described the roles of these different associations stating, *inter alia*, that the TCIA was

similar to the ISA, but were "more in the horticultural end of the business" The ISA Utility Specialist relates (as it suggests) to the electrical utility line clearance industry.

8. Providing a general overview of Tamarack's business, Mr. Randi described it as a "vegetation management company", having a majority of its work in the City of Ottawa (for Hydro Ottawa), with smaller contracts with Greater Sudbury Hydro Plus Inc., ("Sudbury Hydro"), Ontario Ministry of Transportation, National Capital Commission, and Natural Resources Canada. He referred to Tamarack's web site, where Tamarack is described as providing "skilled professionals in utility arboriculture". Mr. Randi explained, and its web site confirms, how the Company provides services in "Cycle Line Clearing, Mechanical Line Cutting, and Emergency Storm Restoration"

9. He described "cycle line clearing" as the process of clearing the electrical (hydro) lines from interference by trees, or other vegetation, so that it lasts approximately for a two to three year cycle, before needing to be re-visited. The customer (the utility company) determines the length of the cycle. "Mechanical Line Cutting" involves work in clearing vegetation under transmission lines (being of higher voltage, which run from a power station), as opposed to distribution lines (lower voltage, but nevertheless potentially dangerous), which service residential, commercial, and public properties. "Storm Restoration" is self explanatory, namely, repairing damage to trees, due to storms, which then impedes the distribution lines. Mr. Randi testified that approximately 95% of Tamarack's work was in cycle line clearing on distribution lines, with approximately 5% being storm restoration work. Mr. Randi explained that the Hydro Ottawa contract also requires Tamarack to perform "off cycle trimming", and that Tamarack assigns one of its crew to perform such work on a regular basis. The need for the work is identified by Hydro Ottawa and assigned to Tamarack. Mr. Randi also confirmed that Tamarack does not provide any private arboriculture services to individual property owners.

10. Mr. Randi testified that Tamarack performs a small amount of transmission line work, which tends to simply involve maintaining the height of trees, or other vegetation, well below the height of the transmission lines which have a broad right of way. Thus, there is little to no attention paid to the aesthetic, or cosmetic, aspect of pruning the trees, or vegetation. In contrast, Mr. Randi differentiated the company's approach when performing cycle line clearing on residential, commercial, or public properties on the distribution lines. He explained how municipalities and utility companies are far more cognizant of the need to prune trees and vegetation in as aesthetic, or cosmetic, a manner as possible so that residents, and other property owners, do not start complaining to either Tamarack, the utility company for whom they work, or their local politicians, that the particular trees on their property, and close to the utility line, have been "butchered" (my descriptor, not the witness's) by Tamarack. He detailed how the residents of Ottawa (and thus Hydro Ottawa) are far more concerned about the health and attractiveness of the city's trees. The same is true for Sudbury, where previously no trees were able to grow, given the mining industry's environmental impact over the many years. However, in the early 1970's the City of Sudbury seeded the area, resulting in a growth of trees that the residents and the City treasure, resulting in Tamarack having to be as careful as possible when performing the cycle line clearance work.

11. Thus, in the Sudbury Hydro's "Request for Proposal" ("RFP"), for the years 2011 – 2013, one finds the following under "1.1 General Information":

> The importance of trees to mankind in general, and the citizens of Greater Sudbury in particular, cannot be overestimated. Not only do trees benefit climatic conditions, but also, from the aesthetic point of view, their contribution is beyond monetary consideration. Trees are encouraged to grow along streets or are planted there to beautify the city and their destruction or unnecessary removal is indefensible.
>
> Desirable as it may be, it is not always practical to locate overhead lines where the pruning of trees for line clearance can be eliminated. It is, however, the established policy of Greater Sudbury Hydro Plus Inc. to engage skilled foresters and to follow recognized arboricultural practices in line clearing work so that the health and appearance of trees may be maintained to the highest degree that existing conditions will permit.
>
> The purpose of performing line-clearing operations is not only to render power circuits free from tree interference so that they may give uninterrupted service, but also to protect the public against avoidable hazards due to the presence of Greater Sudbury Hydro Plus Inc's lines.
>
> In general, ownership of trees will be with the municipality or property owners. In order to maintain good public relations, it is imperative that personnel responsible for line clearing operations notify the adjacent property owners before proceeding with the work. It is also most important that the persons arranging for and performing the work conduct themselves in a manner that would promote good public relations."

12. As an aside, interestingly in the same RFP which Tamarack succeeded in winning the bid for, the work is described by Sudbury Hydro as a "contract for **Forestry Services** within the Greater Sudbury Hydro service area….. **Forestry services** will include the felling and pruning of trees, height reduction, removal of danger trees, log and branch wood processing and chipping, disposal of wood, brush and debris." [emphasis added]. The issue of the varying terminology and definitions utilized in the industry will be addressed later in this decision.

13. The requirements for sound pruning and cutting practices found in the Sudbury Hydro's RFP are also found in both Hydro Ottawa's RFP, and the actual contract which Tamarack subsequently obtained. Without setting out the whole section, which is highly detailed in its requirements, the following "Pruning Standards" are found in the contract, and provide a flavour of the level of detail and requirements of the contract.

> **7.2 Pruning Standards…**
>
> 7.4.1 Saw power cuts shall be flushed with parent limbs or the trunks of trees. Limbs shall be removed in such a manner as to prevent stripping of the bark.

> 7.4.2 Ropes shall be used for lowering cut branches where necessary to prevent damage to trees, conductors, fences and other property. No hangers shall be left in trees after pruning and no twigs or branches shall be left on conductors.
>
> 7.4.3 Old stubs remaining from previous line clearing operations shall be removed as well as any stubs on the line side of the tree resulting from storm damage.
> 7.4.4 If, in obtaining the desired line clearance, trees are rendered unsightly due to lack of symmetry, further pruning to restore their appearance shall be carried out. The extent of such shaping shall be governed by the location of the trees, the nature of surroundings, etc.
>
> 7.4.5 Full shaping shall consist of:
>
> - Removal or shortening by natural or drop-crotch method of branches in crown of tree.
> - Removal or shortening of long straggly branches at sides of trees, removal or shortening of branches at backs of trees to restore balance which has suffered as a result of limbs being removed to obtain clearance on the line side.
> - Removal or shortening of side branches on line side of the tree to eliminate or reduce to a minimum gouged effect, and so on.

14. Throughout his testimony Mr. Randi regularly stressed the importance of utilizing proper pruning practices and referred to Tamarack's "Safety & Training Manual", being some five centimetres (2 inches) in thickness. He testified as to why it was so important to prune or cut branches in the proper manner, as otherwise a tree could be damaged, which eventually may result in the tree dying prematurely. The skills required are set out in what is called the ANSI A300 document, being the American National Standard for Tree Care Operations. As an example, Mr. Rand explained how it is important when cutting a branch that although it should be made as close to the parent limb as possible, it should not cut into what is called the "collar" of the branch. This is because the collar of a branch, which is closest to the parent limb, provides the tree with the means of healing properly following a cut. The larger the branch, the larger its collar.

15. Mr. Randi went on to testify about the different types of trees that are encountered in Ontario, and the fact that when one prunes or cuts a coniferous tree, like pines, they never grow back, whereas deciduous trees, like maples or poplars, grow back relatively quickly. As he stated colloquially, they can grow "like weeds". Thus, the employees must be able to judge how much they prune or cut in order to obtain a satisfactory result, which will last for the two or three year cycle. Even though coniferous trees do not regrow, the collar still needs to be protected so that the tree's healing system can be effective. He described how it was also important not to cut too much of a tree, as if more than 25% of a tree was pruned it would leave insufficient foliage to permit proper photosynthesis, and thus the tree could eventually die.

16. Throughout his detailed testimony about the details of utility line clearing Mr. Randi repeated the importance of pruning and cutting the trees with the cosmetic view in mind, and the customer's (in this case the resident's) sensitivity to the aesthetic impact upon their front or back garden.

17. Further extensive evidence was proffered regarding the differing characteristics of a sample of trees encountered in Tamarack's work, such as Balsam Fir, Box Elder, Norway Maple, Silver Maple, Sugar Maple, Grey Birch, White Ash, White Oak, and American Elm. The evidence, although of interest to an amateur gardener, is only relevant to support the proposition that an arborist's responsibilities, and those who have lesser qualifications, but work under an arborist's guidance, need to build up a wide range of knowledge so as to care for trees correctly when engaged in utility cycle line clearance. In addition, as a matter of contract with Hydro Ottawa, Tamarack crews must keep a tree count of those trees pruned or cut, by type of tree.

18. Mr. Randi testified about the different category of employees working on clearing the utility lines of any and all obstructions. Tamarack functions with crews composed of "groundsmen", "climbers", and "bucket truck operators" In residential neighbourhoods a crew will work at two locations, namely, a person's backyard (garden) and the front site. The entry level position is called a "groundsman", who will perform general ground clearing of cut branches, and other vegetation, in addition to utilizing pole pruners for light pruning, once they have received a couple of months of EUSA training (expanded upon in paragraph 22, herein). The groundsman will also assist the climbers, and those with more experience will help identify what needs to be pruned. They also employ groundsmen with a DZ driving license (which enables them to drive the company's trucks).

19. The next higher classification are the "climbers" who primarily work in the backyards, are more knowledgeable in arboriculture, and climb the trees to perform the necessary pruning and trimming. The climbers are not permitted to utilize foot spikes, but rather ascend the tree with the help of a ladder, and then climb through the tree. The climber will work with the assistance of a groundsman. The "bucket truck operator" works from inside the bucket in order to perform the necessary pruning and trimming. The bucket truck operator has a higher pay level than the climber, and works solely at the front of a property. The bucket truck operator works close to the road, or over the road, and generally is involved with pruning the outside of a tree compared to a climber.

20. Work in a resident's backyard may be performed by either one climber and one groundsman, or two climbers and one groundsman, with one bucket truck operator and one groundsman, and possibly another groundsman acting as a flag person (to control traffic) working in the front site. When the crews arrive at their assigned coordinates for the day the crew themselves have to decide which trees to prune, how to prune them, and by how much in order to meet the requirements of the cycle. If branches are diseased, or decayed, they are removed. However, before a tree can be totally removed in Ottawa, Hydro Ottawa's forester must authorize the removal in advance. Mr. Randi explained that Hydro Ottawa employs who it refers to as "foresters" to liaise with Tamarack.

21. Employees' knowledge of the various type's of trees they encounter is important, among other reasons, as a climber must be able to judge how strong a tree's branches are in order to gauge how and where to climb within the tree. The climbers must also be able to safely judge the approximate weight of branch they are about to cut, and which they may have to hold for a short time, and/or lower with ropes. Further knowledge of the type of wood (very dense, less dense) and its fibres (more or less fibrous) affects how the branch should be cut. The evidence also shows that as the voltage of a particular electrical line increases, so does the amount of clearance from the trees, required by the utility.

22. Cross-examination by the applicant's counsel centered upon the aspects of the purpose of the pruning and cutting, or total removal, as well as the safety aspects of performing the work. Thus, in terms of the general purpose of Tamarack's services Hydro Ottawa's contract describes the contractor as performing "live line clearing services" Further, Mr. Randi agreed that in all of Tamarack's contracts there is a requirement that Tamarack's employees are properly trained in safety standards adopted by The Electrical & Utilities Safety Association of Ontario ("EUSA"). EUSA's "Safe Practice Guide 2008" is 111 pages in length, but the following provides a flavour of its content. It includes the following relevant sections: II – Basic Electricity for Foresters (the Nature and Units of Electricity, Types of Electrical Contact, and Step and Touch Potentials); VI - Tree Pruning; VII - Tree Climbing Techniques; VIII – Working Near Energized Conductors and Apparatus; and IX – Tree Removal. The 2008 Guide's introduction reads as follows:

> Of the many facets of forestry work, line clearing operations involves considerable risk. The risk is due in part to the type of work involved as well as the overall environment. This type of work should be performed from an aerial device; however, it may also require techniques from the body of the tree. The environment involves working near energized electrical conductors and other apparatus. Working around both requires the use of trained and knowledgeable individuals.

Mr. Randi did not take issue with the fact that utility line clearing involved major safety issues. As is often expressed "electricity is unforgiving". As was pointed out to Mr. Randi the Sudbury Hydro RFP requires that "The Contractor must be 'qualified' to perform within 10 feet (three metres) of energized power lines operating at various voltages up to 44,000 volts (44Kv)." Further, section 4.4 of the Sudbury Hydro RFP provides that:

> Any line clearing operation shall provide adequate clearance… whenever possible on all 22/44kV, 12.47kV, and 4.16kV primary circuits, secondary lines, secondary house services, street light services, down guys, pole parameters and street light fixtures in the specified areas.
>
> All trees located on or overhanging the road allowance that interfere with or could cause hazard to Greater Sudbury Hydro Plus Inc's lines shall be trimmed in accordance with these specifications.

There is no disagreement that the Hydro Ottawa RFP, and contract with Tamarack, impose similar requirements.

23. Mr. Randi was referred to the Ministry of Training, Colleges, and Universities apprenticeship training standards for a "Utility Arborist", agreeing that he was familiar with the document, and describing that Tamarack's employees may either possess such qualifications, or obtain them by on the job training by completing approximately 6,000 hours of work. The opening page of the "Apprenticeship Program Summary and Guidelines" provides a "Program Definition" of a "Utility Arborist" as a person who:

> - plans job
> - removes woody plants in proximity to energized electrical apparatus
> - prunes woody plants in proximity to energized electrical apparatus
> - climbs trees and works at heights in proximity to energized electrical apparatus
> - prunes/remove trees in proximity to energized electrical apparatus
> - controls underbrush in proximity to energized electrical apparatus
> - maintains aerial device
> - maintains chainsaw
> - maintains and operates chipper
> - clears vegetation in proximity to transmission voltage conductors" (underlining added)

Mr. Randi agreed that what differentiated a utility arborist from an arborist, was that a utility arborist has received training in working in close "proximity to energized electrical apparatus" Mr. Randi also readily agreed that what qualifies Tamarack to perform the line clearing work is its expertise and competence in vegetation management in relation to power lines, i.e. "energized electrical apparatus".

24. Although the Hydro Ottawa RFP refers to the need for employees to possess qualifications as a "Utility Line Clearer", Mr. Randi agreed that the better term, or preferred term, is "Utility Arborist", but that both terms refer to the same function. Further Mr. Randi acknowledged that Tamarack's "Safety and Training Manual" contains 60 pages of detailed instruction and direction on working with electricity. All of the details need not be repeated in this decision but the opening section provides the following guidance:

> ELECTRICITY IS UNFORGIVING!!!
>
> Part of being a Qualified Line Clearance Arborist is having the knowledge of the hazards associated with working around energized conductors.... Some key points to take from ANSI Z133 relative to working around electricity include:
>
> - Electrical shock will occur when a person, by either direct or indirect contact with an energized electrical conductor, energized tree limb, tool, equipment or other object, provides a path for the flow of electricity to a grounded object or the ground itself.

- Electrical shock may occur as a result of a fault when a person stands near a grounded object (for example, if an un-insulated or di-electrically compromised aerial device comes into contact with a conductor with outriggers down).

- In the event of a downed energized electrical conductor or energized grounded object, there exists a hazard of step potential.

The manual goes on to provide extensive training in working in and around electrical apparatus carrying potentially fatal voltages. Mr. Randi conceded that the manual's section addressing electrical awareness did not differentiate between line clearing work under transmission lines and distribution lines.

25. Consistent with the foregoing Mr. Randi confirmed the fact that utility arborists use insulated tools, including pole pruners made of non-conductive material. Further, that they are required to wear, what are termed, class 2 rubber gloves, and some may wear flame resistant clothing. They also have to wear clothing made of cotton, and not any synthetic materials consistent with protecting against sudden exposure to flames. Mr. Randi also confirmed that in storm restoration work Tamarack's utility arborists might work alongside the utility's linemen, as well as on their own.

26. Upon cross-examination Mr. Randi readily admitted that if a climber enters a person's backyard, and after looking at the trees in the garden and the proximity of the hydro line she/he decides that no pruning or cutting is necessary, that even though there may exist one or more badly shaped trees (from the aesthetic viewpoint) no work would be performed. As he stated "on a good day one may find an 'open wire'". This is consistent with his evidence that Tamarack does not perform private arboricultural work for residents.

27. Consistent with the foregoing, Mr. Randi was also referred to EUSA's safe practice guide, where under the heading tree pruning it suggests there are three main reasons for pruning. Namely,

> 1. Line clearance – removal of sufficient tree growth in an approved arboricultural manner, consistent with good public relations, to provide optimum electrical service.
>
> 2. Sanitation – removal of diseased branches, or where branches have been rubbing each other and where jagged or broken branches must be removed due to storm damage.
>
> 3. Aesthetic – pruning to restore the desired form of the tree.

Mr. Randi then conceded that "aesthetics" only became relevant if the tree impeded the hydro line, and thus required pruning.

Applicability of the Act – Summary of Submissions

28. Counsel for Tamarack submits that the Board should find that its primary business falls squarely within the definition of "horticulture", and that its employees, subject of the application for certification, are all engaged in "horticulture". The company's central argument to support this conclusion is its reliance on what it urges is the applicability of the 1971 *Cedarvale* case (*supra*) of the Ontario Court of Appeal, which understandably Tamarack claims is binding on this Board.

29. Tamarack stresses the Board's finding, and the Court of Appeal's reliance, that the general nature of Cedarvale's "business was the treatment of trees: 70% of its time was spent in pruning, stumping and tree removal, and in addition to performing these functions, its business also involved lightening treatment and protection, cabling and bracing treatment, spraying cavity treatment, bark tracing, feeding and fertilizing of trees, and other incidental services concerning trees". Additional comfort was sought in the Board's finding, and the Court of Appeal's reliance upon the fact, that the work described above was "performed on individual trees, as opposed to wood lots, and involved in many cases the treatment of trees on private property" (*supra. Cedarvale* case, paragraph 8).

30. Counsel for the Company also relied upon the Court of Appeal's agreement with Wright J. [at p. 388 O.R., p. 418 D.L.R.], that:

> The necessity for having activity primarily directed towards growth which attracted the majority of the Board is not a concept required for the application of the word "horticulture" in our society. The word can clearly apply to pruning, topiary work, fallow periods removal of dead trees, plants and vegetables, and to scientific inquiry.

31. The Company submitted that anywhere one finds trees, be they growing on residential, commercial, or public property, should be considered a "garden", presumably to link in with the definitional concept of "horticulture", deriving in part from "*hortus*", being the Latin for "garden", which the Ontario Court of Appeal relied upon (*supra. Cedarvale* case para. 11). Counsel for the Company moved from the foregoing citations to the fact that Tamarack's primary business must be characterized as "horticulture" as 100% of its business is involved in the care of trees, emphasizing that the fact "growth" is not involved is irrelevant. In the alternative, it was argued that even if growth was an included objective, consideration for growth and the aesthetics of the trees still brings the activity within the definition of "horticulture"

32. As regards the impact, if any, of the reality that Tamarack's employees are solely working on and around trees in order to ensure that Hydro Ottawa's, and Sudbury Hydro's, electrical distribution lines are left unimpeded by the trees, counsel for Tamarack submitted that this fact was simply irrelevant. Counsel attempted to argue that there is a difference between the employees having to possess knowledge of electricity, and having to be aware of the safety issues when working in proximity to electricity. As the Company urged on the Board, it should consider the "pith and substance" of the work as being "horticulture", and therefore disregard the context of the work being performed because of the electrical distribution lines. Tamarack urges that the Board perceive the existence of the hydro lines as simply an "added element".

33. The fact that the employees are generally referred to as "utility arborists" was also, in the company's view, just an added element, which should not detract from a finding that the employees were still engaged in "horticulture" Counsel for Tamarack emphasized the uncontested evidence that in more recent times the trend in the industry is for such companies to engage in better quality trimming and pruning of the trees, with an eye to leaving the trees in a more aesthetically pleasing form, as the home owners have become more sensitive to the result of having to cut back the trees, to prevent interference with power lines. Additionally, it was argued that the other trend in the industry (over the last 15 – 20 years) is for companies to have a greater awareness of maintaining the health of all trees being worked on, so that the pruning and cutting had to be performed with greater skill.

34. In summarizing this portion of the Company's argument, relating to the health and cosmetic aspects of the work, counsel submitted that in fact the exception found in section 3(c) of the Act has thus broadened over the last forty years, and that Tamarack is even more involved in an "horticultural" endeavour than when *Cedarvale* was decided.

35. Finally, in returning to the aspect of safety raised by the applicant, Tamarack suggested that the impact of safety, and the *Occupational Health & Safety Act,* ("OHSA") should be viewed as no different than any other employment, such as that of a machinist, in which OHSA responsibilities and protections are simply part of the work. It was submitted that the nature of the safety issues did not alter the true nature of the work, namely the pruning of trees, which leads one back to "horticultural" work.

36. Counsel for the applicant, not surprisingly, commenced his submissions stressing the fact that this was a case involving an organizing campaign, where a majority of the employees voted to become unionized and engage in collective bargaining. The applicant saw a central aspect of the case being an interpretative exercise in that the Board has to arrive at a conclusion as to how one properly characterizes the essential activity of the company and its employees. Counsel for the union highlighted the fact that it was argued by Tamarack that its main goal is the health and beauty of trees, which the applicant viewed as an astounding proposition. As is seen in paragraph 32, above, Tamarack sees the line clearing activity as irrelevant, or at best incidental to supplying skilled tree pruning, and removal, services. In contrast, the applicant argues that the Board should not be characterizing the work by reference to the skill sets involved, but rather by concentrating on the essential purpose of the work, being, in the applicant's opinion, the clearing of interference by trees and other vegetation of the hydro lines.

37. In terms of how the Board should engage in characterizing the work performed by the employees, counsel for the applicant proffered as an analogy the approach the Board applies in deciding whether certain type of work falls within the construction provisions of the Act, or should be seen as maintenance work, and thus not falling within construction. The example provided was to imagine an application for certification for electricians, who if working on a house being built, may be installing certain electrical fixtures, and the obvious conclusion that this would be characterized as construction work. Whereas, if the electricians were requested by a home owner to remove certain electrical fixtures and replace them with new ones, such work

would be considered maintenance, and not construction. Thus, argues the applicant, to characterize the essential "purpose" of the work correctly is crucial.

38. Therefore, argues the union, although there is no question but that the employees are engaged in the pruning and removal of trees, the only reason they are engaged in such activity is for the core purpose of clearing the hydro lines so that service interruptions do not, or are far less likely to, occur. This is why the applicant makes the claim that Tamarack is not in the tree business "as such" The applicant also stresses that the evidence is clear that Tamarack does not perform private arboriculture services, and that its employees cannot be described as "gardeners", or primarily involved with the care of trees in a general manner. Tamarack provides, as self-described on its web site, "utility arborists", with a specific skill set relevant to the work. Thus, argues the applicant, Tamarack's employees work 12 months of the year to meet the needs of the utility companies, with whom they contract, and not the needs of the home/property owners. Counsel for the union relied upon the answer provided by Mr. Randi in cross-examination, that if the degree of clearance of a particular tree in relation to the hydro line is satisfactory, and does not need pruning, no pruning is performed even if the tree is not pleasing from the aesthetic viewpoint.

39. As regards the impact of the *Cedarvale* case, counsel for the union suggests there were a number of reasons that render it inapplicable. The first is that *Cedarvale* was decided prior to the introduction of the *Judicial Review Procedure Act* R.S.O. 1990, c. J.1. as amended, and long before the Supreme Court of Canada established the appropriate principles to consider upon judicial review in such cases as *C.U.P.E. Local 963* v *New Brunswick Liquor* [1979] 2. S.C.R. 227, and *Dunsmuir* v *New Brunswick* [2008] 1 S.C.R. 190. I will expand upon this aspect below. Secondly, the applicant notes the difference between the facts in this case, and those findings of the Board, the High Court of Justice, and Ontario Court of Appeal in the *Cedarvale* case. Again, I will expand upon this below.

40. Next, counsel for the union submits that the Board is addressing its "home statute" and should continue to interpret the Act in a manner that is consistent with *Charter* values, which in turn recognizes the constitutional importance of "freedom of association" and collective bargaining rights. Further, it is urged, that where two equal interpretations of legislation are possible, the one that accords more closely to Charter values should prevail.

41. The union also referred the Board to some six highly reputable dictionaries, and their definition of the word "horticulture". The applicant's purpose being to emphasize the consistent description of horticulture as consisting of the activity of "gardening", and of cultivating or managing gardens, including the growing of plants, flowers, fruits and vegetables. In contrast, the union argued that the essential purpose and work of Tamarack's business could hardly be correctly characterized as gardening. This will be expanded upon in the reasons for decision.

Decision

42. One aspect of the case should be recorded. In a conference call with both counsel, prior to the commencement of hearings, it was agreed that any question raised by the applicant as

to the constitutionality of section 3(c) of the Act need only be addressed if the Board upholds the Company's position that its employees are exempted from the provisions of the Act. Thus, neither party called any evidence to provide "constitutional facts" for such a potential *Charter* challenge, apart from that entered on the matter of the applicability of the Act.

43. The logical starting point for the Board's decision is to set out the correct approach to interpreting both the facts and the law, given the Company's challenge.

44. As has often been stated by both the Supreme Court of Canada, and the Ontario Court of Appeal, when a tribunal is engaged in interpreting its constituent, or home, statute a purposive and contextual approach is required. As the Ontario Court of Appeal recently re-affirmed:

> [33] The Supreme Court of Canada has consistently endorsed Elmer Driedger's purposive approach to statutory interpretation: see *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, at para. 26; *Canada 3000 Inc. Re; Inter-Canadian (1991) Inc. (Trustee of)*, [2006] 1 S.C.R. 865, at para. 36. As Driedger explains, at p. 87 of his *Construction of Statutes* ,2d ed., (Toronto:Butterworths, (1983):
>
> > [T]he words of an Act are to read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> [34] The purposive approach to statutory interpretation requires the court to take the following three steps: (1) it must examine the words of the provision in their ordinary and grammatical sense; (2) it must consider the entire context that the provision is located within (*Bell Expressview*, at para. 27); and (3) it must consider whether the proposed interpretation produces a just and reasonable result (*Bapoo v. Co-operators General Insurance Co.*, 36 O.R. (3d) 616 (C.A.), at para. 8).[5]

45. As set out previously, the respondent's objection to the Board's jurisdiction mainly relies upon the 1971 Ontario Court of Appeal's decision in *Cedarvale* (*supra*). The Board appreciates the applicant's submissions that the application for *certiorari,* following the 1970 Board's decision, occurred prior to the introduction of Ontario's *Judicial Review Procedure Act*, and even more importantly prior to the far more restricted approach to judicial review ushered in by the Supreme Court of Canada's decisions in *New Brunswick Liquor* and *Dunsmuir* (*supra*). Thus, it may very well be possible that were the Board's decision in *Cedarvale* to be judicially reviewed today, the result would differ solely because of the current approach of the courts. This is certainly one factor that the Board could take into account in terms of *Cedarvale's* alleged applicability. However, it clearly could not be determinative as there is a fair degree of speculation in attempting to dissect all three decisions 42 years later. Far more persuasive is the

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[5] *Wawanesa Mutual Insurance Company v. Axa Insurance (Canada)*, 2012 ONCA 592 (CanLII)

Board's conclusion that the facts of the two cases differ sufficiently so as to require a different result.

46. A reading of the decisions of the Board, the High Court of Justice, and the Court of Appeal, leads the Board to conclude that the essential nature of Tamarack's business and that of Cedarvale Trees significantly differ. There is absolutely no question or dispute that Tamarack solely performs the work it has characterized as horticulture, but which is devoted exclusively to providing line clearing services for utility companies, its main customer, Hydro Ottawa, representing 95% of its work at the time of this application. Additionally, it is equally clear that Tamarack performs no arboriculture services for private property owners. Thus, Wright J. for the High Court of Justice, in the *Cedarvale* case (*supra*), stated that:

> The evidence is that 90% of its work involves pruning and removing trees, but whether for *horticultural purposes or not is not established.* At least one-third of its work force is engaged for the North York Hydro Authority, subduing trees that threaten its lines, but the evidence goes no further.... *Those who work full time on tasks such as the North York Hydro job, where pruning and disposal of trees is not related to park or garden or ornamental work, clearly do not come within the exception and are under the Act.* [emphasis added]

How Wright J. reached the conclusion that at least one-third of Cedarvale's work force was assigned to North York Hydro line clearing is difficult to discover, given the findings of fact of the Board. However, assuming the one-third figure to be correct, it is apparent that Cedarvale's business was far from being restricted to utility line work, but rather it was "primarily" engaged in general tree care for private property owners. Moreover, Wright J. held that the employees who were engaged in "subduing trees" on behalf of North York Hydro "clearly do not come within the exception and are under the Act"

47. Thus, the union (appellant in the Court of Appeal) faced the possibility that some employees could have been found to be employed in horticulture, whereas others would not, (namely, those employed on the North York Hydro work). Rather than running the chance of having to return to the Board to sort out what would end up being a smaller bargaining unit, the union apparently decided, as a matter of strategy, to take "an all or nothing" approach before the Court of Appeal and amended its remedy by withdrawing its request that the matter be referred back to the Board to sort out which employees were working on non-horticultural work. (*Cedarvale, supra* at para 18.)

48. In the result the Court of Appeal was then left with the facts, as described in the cite set out in paragraph 29 herein, that "70%" of Cedarvale's service involved most aspects of tree care for the public at large. On any analysis of the decisions it could not be found that Cedarvale's "primary" business was that of utility line clearing, whereas in the instant case that is the only conclusion one can reach given Mr. Randi's evidence and Tamarack's web site information. Moreover, the Court of Appeal did not specifically hold that Wright J. was incorrect in concluding that the employees engaged in line clearing work for North York Hydro were covered by the Act.

49. Counsel for the respondent argues in reply, that Wright J's references, and decision regarding those who performed utility line clearance for North York Hydro not being employed in horticulture, is overtaken by Arnup J's statement that "I hold further that many, if not all, of the persons who comprise the proposed bargaining unit are employed by Cedarvale in horticulture" However, the words "many, if not all", conveys a strong suggestion that Arnup J. was unsure as to the specific breakdown of what all the employees were actually doing. That uncertainty, which is understandable given the Board's findings, could only arise because of those employees working on hydro line clearing, and the union's decision to opt for an "all or nothing" bargaining unit. In either case, one is still faced with the "primary" business of Tamarack and that of Cedarvale being very different. Thus, the Court of Appeal did not need to engage in any analysis of how to characterize line clearing work, as it did not constitute a majority of Cedarvale's work. Therefore, the question for the Board as to what should be the result where it is found that a company's primary business is properly characterized as horticulture, but some of its employees are not engaged in horticulture need not be answered in this case.

50. Additionally, and consistent with the Board's conclusion that the business purposes of the two companies do in fact differ, there is the reality that nowhere in the company's extensive materials does one find any reference to Tamarack employees performing such work as "cavity treatment, bark tracing, feeding and fertilizing of trees…" (*Cedarvale, supra,* paragraph 8). The latter type of work is obviously more consistent with a "horticultural" function, when performed for private property owners, but there is no evidence this type of work is performed when the sole purpose is to ensure hydro lines remain clear of impediments.

51. Another aspect of the *Cedarvale* case provides a further reason for distinguishing that decision, and it raises an interesting question. Namely, what is the most appropriate approach in applying "definitional" meanings? In the *Cedarvale* case the Court of Appeal had the following to say about the word "horticulture":

> Nevertheless, I do not regard the word as having either such a special and peculiar accepted meaning, or one so scientifically esoteric, that expert evidence is needed to elucidate it. We must ask ourselves; in what sense did the Legislature use it in this statute? (*Cedarvale, supra,* paragraph 11.)

The Court then refers to the definition of horticulture provided by three editions of *Encyclopaedia Brittanica* (1959, 1966, 1970 editions). The Court accepted that from "ancient times the word had had a connotation involving a garden, or gardens, including the cultivation of trees" Further the Court of Appeal did "gain some measure of assistance from the provisions of the *Horticultural Societies Act,* R.S.O. 1960, c.175 …. which, for the purposes of that Act at least, has included the planting of trees and production and distribution of trees within the ambit of things that may be done by horticultural societies." (*Cedarvale, supra,* paragraph 13.)

52. Counsel for the union referred the Board to the present day *Agriculture and Horticultural Organizations Act,* R.S.O. 1990 c.A.9, where the objects of a horticultural society are *inter alia* described as:

to encourage interest and improvements in horticulture,

(a) by holding meetings respecting the theory and practice of horticulture;

(b) by encouraging the planting of tree, shrubs, and flowers on public and private grounds;

(c) by promoting balcony and community gardening and outdoor beautification;

...

(e) by distributing seed, plants, bulbs, flowers, trees and shrubs;

...

(h) by promoting the benefits of therapeutic horticulture

....

53. Additionally, the applicant provided the Board with six very similar dictionary definitions of the word "horticulture" They were from:

- the Canadian Oxford Dictionary ("the art or science of garden cultivation");
- the Nelson Canadian Dictionary ("the art or science of cultivating fruits, vegetables, flowers, or ornamental plants"; "2. the cultivation of a garden");
- The Random House Dictionary ("the cultivation of a garden, orchard, or nursery; the cultivation of flowers, fruit, vegetables, or ornamental plants. 2. The science and art of cultivating such plants");
- Webster's Third New International Dictionary ("the cultivation of an orchard, garden, or nursery on a small or large scale; the science and art of growing fruits, vegetables, flowers, or ornamental plants");
- gage Canadian Dictionary ("the cultivation of flowers, fruits, vegetables, etc..");
- The Oxford English Dictionary (2d) ("the cultivation of a garden; the art or science of cultivating or managing gardens, including the growing of flowers, fruits and vegetables."

54. What stands out in the above noted definitions, from reputable dictionaries, is that one does not see any direct reference to "trees" (apart from two references to an "orchard", which obviously does consist of trees, but very specifically, fruit trees). What is paramount in the meanings ascribed to horticulture is that it consistently involves "cultivation", an activity and/or business purpose far from Tamarack's primary business. More importantly, what the recital of the dictionary definitions exposes is the danger, from the viewpoint of interpreting words of a

statute, in relying too heavily upon such dictionary definitions. As Ludwig Wittgenstein (renowned philosopher of language, mathematics, and the mind) wrote of "definitions" – "Do not ask for the meaning, ask for the use" It can be seen that Wittgenstein adopted a "functional" and "purposive" approach to the interpretation of words long before the Supreme Court of Canada approved such a technique regarding interpreting statutes, and constitutional documents.

55. Nevertheless, although reference to "trees" is hardly, if ever, found in standard English dictionary definitions of "horticulture", the fact that "trees" are included within the objects of a horticultural society, obviously means that, for certain purposes, trees may fall within the definition, as the Court of Appeal decided. In contrast, and as an example of linguistic usage as opposed to dictionary definitions, as was noted in paragraphs 11 and 12, herein, the Sudbury Hydro RFP refers to the line clearing personnel as "foresters", with Tamarack providing "forestry services" This should cause the Board to consider Tamarack's services to be more akin to silviculture than horticulture. In a similar vein the EUSA guide also refers to the fact that "Of the many facets of forestry work, line clearing operations involves considerable risk". However, as seen below in paragraph 57, it is currently more common to see the terms "utility arborist" and "utility arboriculture" utilized.

56. It is starkly apparent from a review of a number of the documentary exhibits filed in this matter that nowhere in any of those documents is the word "horticulture" referred to, nor the concept of "cultivation", whether for private, public, commercial, or scientific purposes. I do not suggest "cultivation", whether of flowers, shrubs, trees, or vegetables, is a necessary aspect of every horticultural function, but it is clearly an important and common feature of horticultural activity.

57. What is conspicuous from a review of all the foregoing exhibits is the consistent "use" throughout of the terms such as "utility arborist", "utility line clearer", and "utility arboriculture". Clearly, the last 42 years has seen the evolution of a relatively new specialty and job classification, function, and business endeavour, that bears no reasonable resemblance to the activities of horticultural organizations, or those who provide gardening services, grow vegetables, flowers, shrubs and/or trees, or perform topiary work for private, public, commercial, or scientific purposes, including growing sod for commercial purposes[6]. To accept Tamarack's submission that the essential functions and necessary training of utility arborists, as well as the "pith and substance" of Tamarack's primary business purpose, unquestionably falls within the ambit of the term horticulture equating with the generic concept of gardeners and gardening, stretches one's linguistic imagination.

58. When the Legislature included the exemption from the Act of those employed in agriculture or horticulture it presumably did so in order to protect Ontario farmers (including those engaged in horticultural activities) from the unions' potential economic impact. It is also likely that the Legislature was only too aware of the potential adverse impact a strike could have at the height of the growing season (sometimes only being very short periods of a week, or so). To suggest that the employees of companies primarily engaged in utility line clearing on a

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[6] *Chris Tranberg & Sons Ltd* [2007]OLRB Rep March/April 338

rotational basis of two to three years for a variety of hydro companies and other public bodies were intended to be denied rights to collective bargaining under the Act because they should be viewed as engaging in horticulture simply could not have been the intent of the Legislature. This is especially so as utility companies can directly employ their own employees in the same or similar work who would fall under the Act.

59. As an example of this assertion one only has to review the service contract Tamarack holds with Natural Resources Canada. The respondent's task is to:

> - make certain that all brush, trees, dead trees and branches will be cut….. to such a width that at all places the vista will have a clear skyline, for a total horizontal width of 6.1 metres (20 ft) lying 3.05 metres (10 ft) on each side of the boundary line.

The boundary line referred to is that lying between Canada and the United States. Further that:

> - It is essential that it be accurately followed between boundary monuments and that each segment has the appearance of a straight line of even skyline width.

Even though this contract represents a relatively small percentage of Tamarack's business, the work involved is far more akin to line clearance services provided to utility companies than to any concept of horticultural activity. There is certainly no requirement for "aesthetic pruning" In fact, even though the applicant has adopted the position that it is not relying upon the "silviculture" exception to the section 3(c) exclusion, nevertheless such work in terms of the essence of the purpose of the contract is far more akin to silviculture than to horticulture. Regardless, it is difficult, if not impossible, to understand how such work bears any relationship to horticultural activity.

60. There is one final aspect of the Tamarack's submissions that highlights the danger and illogicality in attempting to apply the term "horticulture" in as broad a manner as submitted. It would require the Board to adopt a test in which it would have to adjudicate the degree to which, if any, the employees of a line clearing enterprise are required to prune trees having regard to the aesthetics of the work. For, as counsel for Tamarack conceded in response to my inquiry, pruning trees without any regard to aesthetics brings the work outside the scope of horticultural work. The thought of determining the applicability of an exemption to rights under the Act depending upon this vice-chair's ability to detect the existence, or not, of aesthetic tree pruning is not a comforting one, let alone to impose such a test upon other decision makers. It also emphasizes the danger of attempting to import some aspects of horticulture into what in essence is the task of ensuring that utility lines, wherever they may be, are free of interference from trees, an activity where one is always working in close proximity to high voltage utility lines, a factor which is far from being incidental.

61. In terms of the Board applying the purposive and contextual approach to interpreting and applying the Act, the Board also adopts the applicant's submissions that it should do so

consonant with the relevant *Charter* rights in mind. As was submitted, there is no reason why employees of Tamarack should be denied *Charter* protected rights under the Act unless the language of the statute and facts demand such a result. Counsel for the applicant relied upon two citations from *Ontario (Attorney-General) v Fraser* [2011] 2 S.C.R. 3, to underscore the *Charter* values in play. Namely, that:

> 2. ….Section 2(d) of the *Charter* protects the right to associate to achieve collective goals. Laws or state actions that substantially interfere with the ability to achieve workplace goals through collective actions have the effect of negating the right to freedom of association and therefore constitute a limit on the S.2(d) right of free association...,

unless justified by section 1 of the *Charter*. Additionally, the applicant relied upon the *Fraser* decision where the majority relied upon the majority in the *Health Services*[7] case, where the Court stated that:

> Thus the employees' right to collective bargaining imposes corresponding duties on the employer. It requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation. [para 90].

Such *Charter* rights argued the applicant, "Like all *Charter* rights must be interpreted generously and purposively." (*Fraser*, *supra*, para 117.)

62. To buttress the latter approach to interpreting the Act, the applicant further relied upon the decision of the Nova Scotia Labour Board in the *Egg Films Inc* case[8], where after citing similar extracts from the *Health Services* case as seen above, the Board went on to find that:

> This Board can only infer that the Supreme Court of Canada was strongly reinforcing the notion that labour relations tribunals must be careful to ensure that in interpreting their constitutive statutes, they engage in a purposive interpretational approach which is consonant with the *Charter* values of freedom of association in the *Charter* section 2(d) and upholds at least the minimal core of collective bargaining rights deemed to be protected by the reasoning in *B C. Health.*

These are not principles of interpretation that one can question, and in fairness to counsel for the Company, she did not attempt to do so.

- [7] *Health Service and Support – Facilities Subsector Bargaining Assn v British Columbia,* [2007] 2 S.C.R. 391
- [8] *The International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of The United States, Its Territories, and Canada, Local 849 v Egg Films Inc.* 2012 NSLB 120 (CanLII)

63. Finally, on the issue of the appropriate approach to interpretation, the applicant drew again from the Supreme Court of Canada, where it stated in *R* v *Tse* [2012] S.C.J. No.16, at paragraph 20, that:

> For centuries courts have interpreted legislation to comply with common law values, not because compliance was necessary for validity, but because the values themselves were considered important. This reasoning applies with even greater force to entrenched constitutional values": R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at page 461. Accordingly, where legislation is permitting of two equal interpretations, the Court should adopt the interpretation which accords with *Charter* values: *R* v *Zundel,* [1992] 2 S.C.R. 731 at p.771….

The Board agrees and adopts the interpretative approach urged by the applicant, not only because the foregoing are decisions of the Supreme Court of Canada, but because the approach is clearly justified, and mandated by section 64 of Ontario's *Legislation Act* S.O. 2006 c.21, as amended, (formerly section 10 *Interpretation Act*), which provides that:

> An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

Such principles are particularly applicable where one is addressing the meaning to be given a statutory exemption that has the effect of denying *Charter* rights that have been recognized by the Supreme Court of Canada.

64. This is why the Board believes that the only sensible and consistent test in judging how one characterizes an employer's primary business, and whether a person is employed in horticulture, is to look to the "essential purpose" or "pith and substance" of the company's business, and what the employees actually do. Such an approach mirrors the "purposive interpretational approach"[9]applicable to *Charter* questions. Thus, the Board finds that the employees of Tamarack are not engaged in "horticulture", nor does an employer whose primary business is horticulture employ them. Even if one could conclude that there are two equally feasible interpretations (and application) of the term "horticulture" in the context of line clearing work, the directive of the Supreme Court of Canada that "where legislation is permitting of two equal interpretations, the Court should adopt the interpretation which accords with *Charter* values: *R* v *Zundel,* [1992] 2 S.C.R. 731 at p.771…". (*supra, R* v *Tse*) would trump the attempted exclusion of such employees from the Act. Therefore they are protected by the Act.

65. On the taking of the representation vote directed by the Board, more than 50% of the ballots cast by employees in the bargaining unit were cast in favour of the applicant. The Company has withdrawn its version of the proposed bargaining unit, and now agrees with the applicant's original description. Thus, a certificate will issue to the applicant for a bargaining unit of "all employees of Tamarack Tree Care Ltd. working in and out of the City of Ottawa save and except supervisors, persons above the rank of supervisor, and office and clerical staff."

- [9] *Egg Films, supra*

66. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiry of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before then.

67. The responding party is directed to post copies of this decision upon receipt for a period of 10 days, adjacent to all copies of the "Notice of Vote and Hearing" posted previously.

2108-11-U Tara Satnarine, Applicant v. Ontario Public Service Employees Union, Responding Party v. The Crown in Right of Ontario as represented by the Ministry of Attorney General, Intervenor.

Duty of Fair Representation – The applicant complained that OPSEU lost or abandoned a number of grievances she filed relating to the employer's failure to accommodate her or make efforts to relieve her of alleged harassment in the workplace – The evidence showed that three union representatives (two local presidents and a grievance officer) failed to process grievances and were grossly negligent in failing to return phone calls and email communication with the applicant – Since the employee had retired from the public service, remitting the matter to arbitration was not an option Application allowed; declaration granted; remedy remitted to parties and Labour Relations Officer

BEFORE: Kelly Waddingham, Vice-Chair.

APPEARANCES: *Tara Satnarine* appearing on behalf of herself; *Adrienne Liang* appearing for the responding party; *Heather McIvor, Edith Brethour* and *Marie-Claire Muamba* appearing for the intervenor.

DECISION OF THE BOARD: January 9, 2013

1. This is an application in which Ms. Tara Satnarine alleges that the responding party trade union the Ontario Public Service Employees Union ("OPSEU") has contravened section 74 of the *Labour Relations Act, 1995,* S.O. 1995, c.1, as amended (the "Act"). Ms. Satnarine alleges that OPSEU closed a grievance dated April 7, 2006 without her knowledge and took no action with respect to her grievances dated March 11, 2008 and August 29, 2008.

2. OPSEU submits that they have no record of the grievances and in the alternative it has made an honest mistake.

3. The intervenor employer submits that it has no record of these grievances filed on behalf of the applicant.

FACTS

4. Ms. Satnarine worked as a human rights representative until her retirement in December 2008, having worked in the Ontario Public Service since 1979.

5. All three grievances (April 7, 2006; March 11, 2008 and August 29, 2008) filed by Ms. Satnarine relate to her struggle with the employer for accommodation and relief from alleged harassment in the workplace.

6. OPSEU submit that the procedure within OPSEU locals involves individuals filing grievances with the help of a local officer (usually a steward) with management at the local level. If the matter is not resolved after the stage two meeting it is then sent to the Contract Enforcement Unit at OPSEU Head Office which formally refers the grievance to arbitration by sending it to the Grievance Settlement Board ("GSB").

7. Unfortunately, for Ms. Satnarine, her grievances got lost in the shuffle amongst various OPSEU officials.

8. In June 2002, Ms. Satnarine filed a grievance with the local union of OPSEU. The matter was not resolved at the local level. After the stage two meeting, the grievance was sent to the Contract Enforcement Unit at OPSEU's head office. Mr. Mark Barclay, a grievance officer, was assigned to the case. The matter was referred to the GSB where it was subsequently settled on October 27, 2005.

9. On April 7, 2006, Ms. Satnarine presented a grievance to Mr. Kevin Brown, the President of Ms. Satnarine's local union. This grievance stated that the employer had "failed to accommodate my disability by, among other things, relying on inaccurate, inappropriate and inconclusive medical information; discriminated against me on the basis of disability, workplace injury and race; failed to make reasonable provisions for my safety and health; inappropriately disclosed confidential medical information to my manager, and; has disciplined me without just cause in the letter from Michael Harris dated April 5, 2006." The grievance was signed by Mr. Brown. It appears this grievance was never delivered to the employer.

10. In October 2006, the parties returned to the GSB to deal with the issue of the enforcement of the October 27, 2005 minutes of settlement arising out of Ms. Satnarine's 2002 grievance and Ms. Satnarine's ongoing allegations of discrimination and harassment.

11. On July 26, 2007, after leaving numerous telephone messages, Ms. Satnarine sent Mr. Brown an electronic mail message inquiring as to the status of her April 2006 grievance.

12. On November 11, 2007, Mr. Brown responded in writing to Ms. Satnarine's email advising that Mr. Barclay was no longer assigned to process grievances for Ms. Satnarine's local union. Mr. Brown reported that Mr. Barclay did not recall any further action taken by the employer in response to the 2002 grievance but agreed to raise the issue with the Mr. Stacy Zafaraidis, the new grievance officer assigned to Ms. Satnarine's local union. In his email reply email Mr. Brown states:

> I spoke to Mark soon after we last met. He did not recall any further action to be taken by the employer. He is no longer assigned to MAG grievances, but agreed to raise the issue with the grievance officer assigned, Stacy Zafaraidis. I agreed that it would be best if a new GO looked into the issue.
>
> I followed up by email on October 31 and have not received a reply.
>
> I placed a phone call to Stacy today requesting that he contact me to discuss the matter.
>
> I am trying to get some action on this, but am feeling some frustration myself. Unfortunately, my own schedule has been incredibly busy these last few months and I have barely had enough time to look after union matters pertaining to my own unit.

13. On March 11, 2008, Ms. Satnarine met with Mr. Brown and prepared another grievance alleging discrimination and a violation of the *Ontario Human Rights Code* after the employer failed to provide her with the full complement of sick credits under the short term disability plan. When OPSEU files a grievance there are five coloured carbon copies which are distributed to management, the steward, the regional office, the arbitrator and the grievor. Ms. Satnarine provided the Board with her original yellow copy of the grievance. The March 11, 2008 grievance, like the April 7, 2006 grievance, appears never to have been delivered to the employer.

14. On August 29, 2008, Ms. Satnarine met with Mr. Brown and prepared a third grievance alleging employer harassment on the basis of her disability. At this meeting Ms. Satnarine inquired about the status of her previous grievances. Mr. Brown informed Ms. Satnarine that he had still not heard from Ms. Zafaraidis. Ms. Satnarine provided the Board with her original yellow copy of the grievance. Likewise, the August 29, 2008 grievance appears not to have been delivered to the employer.

15. In September 2009, Ms. Satnarine left several telephone messages for Mr. Brown which were not returned.

16. In February 2010, Ms. Satnarine left a telephone message for Mr. Brown requesting that if he was unable to address her grievances, he should return her file and she would have to speak with someone at OPSEU's head office.

17. In March/April 2010, Ms. Satnarine received an incomplete file and contacted Mr. Brown to request that she be sent a complete file. In May 2010, Ms. Satnarine contacted Mr. Brown who advised her that he had nothing further for the file. Mr. Brown also advised Ms. Satnarine that due to his increasing responsibilities at work he was no longer doing any work for the union.

18. In September 2010, Ms. Satnarine made several calls to OPSEU's head office. Ms. Satnarine was told that Stacy Zafaraidis, the grievance officer assigned to her file, was on

parental leave. Ms. Jennifer Markoe-Hoskin, the officer assigned to the file during Mr. Zafaraidis's parental leave was on leave until February 22, 2011.

19. In October 2010, Ms. Satnarine spoke with OPSEU Staff Representative Ms. Ann Ledwidge to request that her file be assigned to another officer. In November 2010, Ms. Satnarine sent copies of the three grievances (April 7, 2006; March 11, 2008 and August 29, 2008) via facsimile to Ms. Ledwidge.

20. On January 24, 2011, Ms. Ledwidge advised Ms. Satnarine in writing that she had sent a copy of Ms. Satnarine's grievances to Mr. Barclay. Ms. Ledwidge asked Mr. Barclay to contact Ms. Satnarine and provide her with a copy of a settlement which Mr. Barclay said Ms. Satnarine had signed in 2008. Mr. Barclay did not contact Ms. Satnarine.

21. Ms. Satnarine left several messages for Mr. Barclay, none of which were returned.

22. On February 24, 2011, Ms. Ledwidge referred Ms. Satnarine to OPSEU Supervisor Ms. Laurie Chapman.

23. On March 1, 2011 Ms. Satnarine spoke with Ms. Chapman who advised that she would need a couple of weeks to look into the matter. On March 14, 2011, Ms. Chapman advised that she had spoken with Messieurs Brown and Barclay who advised that Ms. Satnarine's grievances were settled or closed. Ms. Chapman referred to the fact that the file was closed in May 2007. When Ms. Satnarine inquired about the grievances which had been filed in 2008 she was told that there was no record of the grievances and that she should speak with the local president.

24. Ms. Satnarine left several messages for Local President Mr. David Prescod which were not returned.

25. On April 13, 2011, Ms. Satnarine wrote a letter to OPSEU Administrator Mr. Heino Neilson requesting his assistance. Mr. Neilson referred the matter back to Ms. Chapman.

26. On July 8, 2011, Ms. Chapman wrote Ms. Satnarine advising that her grievance dated January 29, 2005 was settled on October 27, 2005. OPSEU advised that in October 2006, they returned to the GSB to enforce the settlement. Ms. Chapman advised that Ms. Satnarine had been advised on May 14, 2007 that the file had been closed. Ms. Chapman further advised that there were no other grievances on file for Ms. Satnarine.

27. On September 26, 2011, Ms. Satnarine filed her application with the Board.

ANALYSIS

28. Section 74 of the Act provides:

> A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

29. The applicant did not suggest at the consultation that OPSEU discriminated against her or bore her any hostility or ill will. The issue then is whether OPSEU's processing of the applicant's grievances was arbitrary.

30. OPSEU submits that neither it nor the employer have any record of Ms. Satnarine's grievances. OPSEU submits that the copies of the March 11, 2008 and August 29, 2008 grievances provided with the Application are not signed by either the steward or the local president. In order for a grievance to be properly filed with the Employer it must be signed by a local union official. The Board infers from OPSEU's argument that Ms. Satnarine did not file the grievances. In the alternative, OPSEU argues that any failure to refer the grievances to the GSB was an "innocent" mistake.

31. Honest mistakes, innocent misunderstandings, simple negligence and errors in judgement are not generally viewed by the Board as contravening the duty of fair representation. The fact that a union representative has made a mistake in the way in which it has processed a grievance on behalf of an employee does not necessarily mean that the union has breached its standard of fair representation, even where that mistake has resulted in prejudice to the employee(s) concerned. However, as the Board noted in *North York General Hospital,* [1982] OLRB Rep. August 1190, at paragraph 16, "[t]here comes a point […] when "mere negligence" becomes "gross negligence" and when gross negligence reflects a complete disregard for critical consequences to an employee then that action may be viewed as arbitrary for the purposes of section [74] of the Act."

32. Ms. Satnarine provided the Board with a copy of all three grievances, including the April 7, 2006 grievance, which is signed by the local president. Ms. Satnarine advised that she met with local president Mr. Brown on April 7, 2006, March 11, 2008 and August 29, 2008 to discuss her situation. Their discussions included the status of the grievances. Considering all the evidence and circumstances of this case, I find that more likely than not the grievances at the local level were never referred to management and never processed. This failure to perform the simplest of tasks falling within the Union's duty of fair representation constitutes gross negligence in the absence of any other explanation.

33. An act of gross negligence is arbitrary conduct within the meaning of section 74 of the Act. OPSEU representatives had numerous opportunities prior to July 2011 to advise Ms. Satnarine that they had no record of her grievances. Rather, union representatives either ignored Ms. Satnarine's telephone calls or provided no meaningful information.

34. This is not a case of one union representative not returning a telephone call but rather three union representatives (two local presidents and a grievance officer) repeatedly not returning

Ms. Satnarine's telephone calls. When Ms. Satnarine's telephone calls were not being returned in July 2007, she emailed the local president who did not respond to the email for four months, stating "I said that my recollection was also that some further action had been outstanding and asked the grievance department to follow up." As the Board commented in *Paul Brunet,* [2003] OLRB Rep. January/February 24: "The very least a union owes to those it represents is ongoing, timely communication about grievances, and the decisions it is making with respect to their management."

35. In the circumstances of the instant case, reference may be made to *Softley Cartage Limited,* [1982] OLRB Rep. May 766, in which the Board wrote as follows concerning the effect of a trade union's failure to at least attempt to meet reasonable standards of communication with an aggrieved employee:

> … the Board would note that a failure by a trade union to meet reasonable standards of communication with aggrieved employees that it represents, at least in terms of the EFFORTS that it makes, can operate to the trade union's prejudice in a number of significant ways [emphasis added in upper case text].... Or the mere unwillingness [or] lack of effort to communicate, if unreasonable, may in itself point in the direction of conduct which is arbitrary, discriminatory or in bad faith, and cause the Board to view with particular attention the actual level of representation afforded by the trade union. And short, even, of these possibilities, such conduct on the part of a trade union may involve it in lengthy and expensive proceedings before the Board which, through just a little more care in communicating, could conceivably have been avoided. ...

36. Ms. Satnarine had filed a grievance in 2002 which had been settled in 2005. She was aware that it could take time for a grievance to be processed. She was persistent in her attempts to communicate with the union.

37. Ms. Satnarine was frequently referred from one OPSEU representative to another who was supposed to have responsibility for her grievances. In the Board's view, OPSEU's careless and misleading communication followed by the subsequent failure to verify and/or to communicate important information such as the fact that there was no record of her grievances reflects such a careless disregard for the representation of her that it must be viewed as grossly negligent.

DISPOSITION

38. For the foregoing reasons, the Board finds and hereby declares that the respondent trade union, OPSEU, has contravened section 74 of the Act in its failure to process the grievances and communicate with the grievor.

39. The applicant has asked that her grievances be referred to arbitration. However, the prejudice to the employer in a case which involves accommodation in the workplace where the

applicant is no longer employed is insurmountable. Therefore I will not refer the grievances to arbitration.

40. In all the circumstances of this case, it is not clear whether any remedy other than a declaration of a violation of the Act is warranted. The applicant's grievances all related to the duty to accommodate her situation in the workplace, but the applicant has now left the employer's employ. However, there may be other aspects that need to be addressed.

41. Therefore, I direct the parties to meet with a Labour Relations Officer to try and resolve the issue of remedy amongst themselves. Should the parties be unable to resolve the matter, any party may request the Registrar to list this matter for hearing. In the event, no such request is received by March 1, 2013, this matter will be deemed terminated without further notice to the parties.

COURT PROCEEDINGS

1048-07-HS (Court File No. C54427) Blue Mountain Resorts Ltd. and Ministry of Labour and Ontario Labour Relations Board; MacPherson, Armstrong and Blair JJ.A.

Health and Safety – Judicial Review – A guest at a ski resort died while swimming in an unattended pool – The Court of Appeal considered whether a ski resort was required to report a "guest injury" to the Ministry of Labour on the basis that it was a death or critical injury incurred by a person at a workplace as contemplated by subsection 51(1) of the *Occupational Health and Safety Act* ("Act") – The Board concluded that reporting was required because a swimming pool was a "workplace" – The Divisional Court dismissed the application for judicial review on the basis that the Board's determination was reasonable – The Court of Appeal held that the Board's decision was unreasonable – The interpretation given by the Board to subsection 51(1) that focused on location would make every place a "workplace" because a worker may be present or passing through at some time; consequently, any death or critical injury to anyone and anywhere would be a reportable occurrence, regardless of the cause – Although the Act is remedial and subsection 51(1) is intended to capture a range of injuries affecting workers, the Board's approach would expand the powers of the Ministry beyond what was intended by the legislature and is required to ensure worker safety – Interpreting the provision contextually and purposively, the words "from any cause" are to be interpreted as requiring some nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety – In addition to this nexus, reporting requirements will be triggered where the death or injury occurs at a place where a worker is carrying out his or her employment duties at the time the incident occurs or one where a worker might reasonably be expected to be carrying out such duties in the ordinary course of work; and where a worker or non-worker is critically injured – There was no evidence that the pool death was caused by any hazard that could affect worker safety – Appeal allowed

Superior Court of Justice (Divisional Court), R.A. Blair, MacPherson, and Armstrong JJ A.
February 7, 2013

R.A. Blair J.A.:

Overview

[1] On December 24, 2007, a guest at Blue Mountain Resorts died while swimming in an unattended indoor pool at the resort. The issue on this appeal is whether Blue Mountain was required to report this "guest injury" to the Ministry of Labour on the basis that it was a death or critical injury incurred by a person at a workplace as contemplated by subsection 51(1) of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1.

[2] Blue Mountain takes the position that it is not required to report deaths or critical injuries to guests at its recreational facility because the facility is not predominantly a workplace and a worker was not present at the site when the injury incurred. However, the respondent, Mr. Den Bok – an inspector under the Act – took the view that reporting was required, and issued an order to that effect, along with other related orders. The Ontario Labour Relations Board upheld the order.

[3] An application for judicial review from that order was dismissed by the Divisional Court. It found the Board's determination that the swimming pool was a "workplace" to be reasonable. The Board inferred that employees of Blue Mountain must have been present at other times in the pool area in order to check and maintain it. Similarly, the Divisional Court accepted that "it is common ground that the swimming pool is a place where one or more workers work."

[4] For the reasons that follow, I would set aside the decisions of the Divisional Court and the Board. The interpretations they gave to s. 51(1) of the Act would make virtually *every place* in the province of Ontario (commercial, industrial, private or domestic) a "workplace" because a worker may, at some time, be at that place. This leads to the absurd conclusion that every death or critical injury to anyone, anywhere, *whatever the cause*, must be reported. Such an interpretation goes well beyond the proper reach of the Act and the reviewing role of the Ministry reasonably necessary to advance the admittedly important objective of protecting the health and safety of workers in the workplace. It is therefore unreasonable and cannot stand.

[5] In my view, a proper interpretation of the Act requires that there be some reasonable nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety at that site. There is no such nexus here.

[6] Sometimes a swimming pool is just a swimming pool.

The Legislative Framework

[7] The relevant provisions of the Act are the following:

Definitions

(1) In this Act,

"employer" means a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services; ("employeur")

"worker" means a person who performs work or supplies services for monetary compensation but does not include an inmate of a correctional institution or like institution or facility who participates inside the institution or facility in a work project or rehabilitation program; ("travailleur")

"workplace" means any land, premises, location or thing at, upon, in or near which a worker works; ("lieu de travail")

...

Notice of death or injury

51(1) Where a person is killed or critically injured from any cause at a workplace, the constructor, if any, and the employer shall notify an inspector, and the committee, health and safety representative and trade union, if any, immediately of the occurrence by telephone or other direct means and the employer shall, within forty-eight hours after the occurrence, send to a Director a written report of the circumstances of the occurrence containing such information and particulars as the regulations prescribe.

Preservation of wreckage

(2) Where a person is killed or is critically injured at a workplace, no person shall, except for the purpose of,

(a) saving life or relieving human suffering;

(b) maintaining an essential public utility service or a public transportation system; or

> (c) preventing unnecessary damage to equipment or other property, interfere with, disturb, destroy, alter or carry away any wreckage, article or thing at the scene of or connected with the occurrence until permission so to do has been given by an inspector.
>
> . . .
>
> **Powers of inspector**
>
> 54(1) An inspector may, for the purposes of carrying out his or her duties and powers under this Act and the regulations,
>
> (a) subject to subsection (2), enter in or upon any workplace at any time without warrant or notice;
>
> (b) take up or use any machine, device, article, thing, material or biological, chemical or physical agent or part thereof;
>
> (c) require the production of any drawings, specifications, licence, document, record or report, and inspect, examine and copy the same;
>
> . . .
>
> (i) require that a workplace or part thereof not be disturbed for a reasonable period of time for the purposes of carrying out an examination, investigation or test;

[8] The word "person" is not defined in the Act.

Facts

[9] Blue Mountain Resort Limited owns and operates an all-season resort and recreational facility, located on a 750-acre property near Collingwood, Ontario. The resort offers 36 downhill ski runs and other recreational facilities including mountain biking trails, a golf course, and an indoor swimming pool.

[10] When the deceased guest was first found, a defibrillator was used in an attempt to revive him; it showed no electrical signal and Blue Mountain therefore assumed the guest had suffered a heart attack. As it turned out, he had simply drowned while swimming in the pool.

[11] The pool was unsupervised and intended for use by resort guests for recreational purposes. No Blue Mountain employees were working there at the time the drowning occurred.

[12] In her reasons, the Board member acknowledged that she had "heard no evidence as to the work done by the employees of Blue Mountain within the enclosed area of the indoor swimming pool where the guest drowned … [and no evidence] … as to how regularly employees go into this area … or how many employees enter this area." "Based on general and common knowledge," however, she inferred "that at least one and perhaps more Blue Mountain employees must enter the enclosed area of the indoor swimming pool in order to clean the pool and check the water at least once, and likely more times, each day." She therefore concluded that "[t]he swimming pool thus comprises a part of at least one Blue Mountain employee's workplace", and that "[i]t does not cease to be a 'workplace' because the employee in question moves from that area of his or her workplace to another area of the same workplace."

[13] Much evidence before the Board – and much argument here and below – were dedicated to the broader implications of Mr. Den Bok's reporting order for Blue Mountain's ski operations and for recreational facilities in general in the province of Ontario. Conservation Ontario was granted leave to intervene below and Tourism Industry Association of Ontario was subsequently granted leave to intervene in this Court because of the perspectives they bring to those broader concerns.

[14] Those broader implications and concerns are instructive for the interpretation to be given to the language used in s. 51(1) because they provide insight into the concerns arising from the Ministry's interpretation of the section. I will outline them briefly.

[15] In peak season, Blue Mountain employs 1,750 staff. In February, it may have as many as 16,000 visitors on a Saturday and another 10,000 on a Sunday. The evidence was that there are approximately 1.5 skiing related incidents for every 1,000 visitors at Blue Mountain (the industry average is 2 incidents per 1,000 visitors). It follows that there could be as many as 39 occasions on a February weekend where – if inspector Den Bok's approach is to be adopted – Blue Mountain could be required to report to the Ministry. As the appellant and the intervenors point out, s. 51(2) of the Act prohibits the employer from disturbing or altering the scene of the occurrence until permission is given by an inspector. Therefore, many ski slopes may have to be closed entirely or in part until released by a Ministry inspector.

[16] Mr. Den Bok's evidence was that in most cases, such a release will be provided by telephone but, if not, within a couple of hours if an inspector had to attend the site. However, the evidence was that such closures would create potential hazards for skiers and snow boarders using the runs in winter and for mountain bikers in the summer, as well as disruptions to Blue Mountain's operations generally.

[17] A representative of the Ontario Snow Resorts Association testified before the Board. His evidence was that there were approximately 7,000 accidents at ski resorts across Ontario during the 2007-2008 ski season. His concern was that ski patrollers do not have the training to diagnose whether an injury is "critical" or not and that, in many cases, there is no way of making that determination at the time of the incident. Failure to report, however, could lead to prosecution under the Act. He repeated the concern that the requirement to preserve the accident scene under s. 51(2) would make ski hills very dangerous and difficult for resorts to operate.

[18] The Ministry's requirement that resorts report "guest injuries" is apparently new. Blue Mountain has been subject to the Ministry's review for 27 years, but has never before been required to report such injuries. The same is true for other resorts. The Ministry explained its shift in policy by saying it was due to a number of resorts appearing in its high risk category.

[19] Here, the guest injury occurred in a swimming pool, not on the slopes. However, the foregoing factors ground the concerns of the tourism and recreation industries in Ontario with the potential expansion of the Ministry's role in the regulation of their affairs.

Analysis

[20] The Ontario Labour Relations Board is an expert tribunal that was interpreting a statute within its mandate and engaging its specialized expertise. The Divisional Court was therefore correct in holding that the standard of review of the Board's decisions is reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII), 2008 SCC 9, [2008] 1 S.C.R. 190; and *Lennox Drum Ltd. v. Ah-Hone et al.*, 2010 ONSC 4424 (CanLII), 2010 ONSC 4424, 266 O.A.C. 396 (Div. Ct.), at para. 4.

[21] The concept of reasonableness, for administrative law purposes, was described by the Supreme Court of Canada in *Dunsmuir* as a deferential standard. Reasonableness is concerned mostly with the existence of justification, transparency, and intelligibility within the decision-making process. While tribunals have a "margin of appreciation" within the range of rational outcomes, a reasonable decision is also one that "falls within a range of possible, *acceptable outcomes which are defensible* in respect of the facts and law" (emphasis added): *Dunsmuir*, at para. 47.

[22] The appellant and the intervenors argue that the Board and the Divisional Court erred in conducting an analysis that focused only on end risks without considering whether there was, in the circumstances, any reasonable connection between what actually happened and a risk to worker safety at the site. Counsel submits this open-ended approach leads to absurd results, rendering the interpretation unreasonable. I agree.

The Board's Interpretation is Unreasonable

[23] The language "where a person is … critically injured from any cause at a workplace" in s. 51(1) of the Act is undoubtedly intended to capture a wide range of injury-related occurrences affecting the safety and wellbeing of workers. As the Board member correctly observed, "the Act is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers."

[24] Public welfare legislation is often drafted in very broad, general terms, precisely because it is remedial and designed to promote public safety and to prevent harm in a wide variety of circumstances. For that reason, such legislation is to be interpreted liberally in a manner that will give effect to its broad purpose and objective: *R. v. Timminco Ltd.* 2001 CanLII 3494 (ON CA), (2001), 54 O.R. (3d) 21 (C.A.), at para. 22.

[25] In *Ontario (Ministry of Labour) v. Hamilton (City)* 2002 CanLII 16893 (ON CA), (2002), 58 O.R. (3d) 37 (C.A.), at para. 16, Sharpe J.A. reinforced that notion:

> The *OHSA* is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers. When interpreting legislation of this kind, it is important to bear in mind certain guiding principles. Protective legislation designed to promote public health and safety is to be generously interpreted in a manner that is in keeping with the purpose and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided.

[26] This generous approach to the interpretation of public welfare statutes does not call for a limitless interpretation of their provisions, however.

[27] One of the problems with what is otherwise an understandable approach to the interpretation of public welfare legislation is that broad language, taken at face value, can sometimes lead to the adoption of overly broad definitions. This can extend the reach of the legislation far beyond what was intended by the legislature and afford the regulating ministry a greatly expanded mandate far beyond what is needed to give effect to the purposes of the legislation.

[28] Such is the case, in my view, with the interpretation given by the Board and the Divisional Court to the language of s. 51(1) in this case.

[29] In these circumstances, the principle of statutory interpretation affirming that broad language may be given a restrictive interpretation in order to avoid absurdity may come into play: *Ontario v. Canadian Pacific Ltd.*, 1995 CanLII 112 (SCC), [1995] 2 S.C.R. 1031, at pp. 1081-82; and *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, 1996 CanLII 149 (SCC), [1996] 3 S.C.R. 727, at para. 109, *per* Iacobucci J.

[30] The central thrust of the Board's reasoning is found at paras. 61 and 75 of its reasons:

> [T]he purpose of the Act is to provide protection to workers … where workers are vulnerable to the same hazards and risks as non-workers who attend at a workplace, it is not an absurd result for an employer to be required to report when a non-worker suffers a critical injury at a workplace.… If the goal is to enhance worker safety by alerting the Ministry to hazards in the workplace that could affect workers, a provision that requires the reporting of critical injuries suffered by non-workers in places where workers work, regardless of whether a worker was present at the time and place of the critical injury, is not absurd.
>
> …

> Blue Mountain is a fixed workplace. There is a fixed location to which employees regularly report.... The area of the resort where the Blue Mountain employees perform their work functions is a "workplace" ... The fact that an employee is not physically present within a section of that "workplace" does not mean that that particular section is not part of the "workplace" during the period when no employees are present.

[31] There are some attractive aspects to this reasoning, to be sure. I do not quarrel with the proposition that workers may be subject to the same hazards and risks of death or critical injury as non-workers. When this is the case, an employer may be required to report when a non-worker dies or suffers a critical injury at a workplace in order to give effect to the purpose of the Act. The Divisional Court's comment in this regard is particularly instructive:

> Workers and guests are vulnerable to the same hazards. The purposes and intents of the legislation would be undermined *if a physical hazard with the potential to harm workers and non-workers alike* was not subject to reporting and oversight. [Emphasis added.]

[32] I do not disagree with that observation. It is anchored in *a hazard or risk that has the potential to harm workers*. However, the conclusions of the Board and the Divisional Court are founded on an analysis that has no such anchor. It simply assumes that because an accident has occurred at a place where a worker may be at some point in time, the accident becomes a workplace accident. This is apparent from the following statement in the reasons of the Divisional Court:

> The obligation created by s. 51(1) upon employers to report when a person is killed or critically injured *is driven by result rather than by causation*. Hence on a plain reading of the subsection, any event resulting in death or critical injury, *even if occurring in circumstances having no potential nexus with worker safety*, is reportable so long as they occur in a workplace. [Emphasis added.]

[33] Respectfully, I do not agree with that conclusion. The potential results are too far reaching. Indeed, the Divisional Court recognized, at the close of the foregoing passage, that "the subsection as interpreted by the Board has a potential to reach beyond the ambit of the purposes of the statute." The interpretation is unreasonable for that very reason, in my view.

[34] Why do I say that?

[35] The Board's conclusion – found by the Divisional Court to be reasonable – is founded on what is, in effect, an entirely location-based analysis. It would trigger s. 51(1) whenever a non-worker dies or is critically injured at or near a place where a worker is working, has passed through, or may at some other time work, regardless of the cause of the incident. The ramifications of this interpretation go far beyond what the legislature could have intended and beyond what is reasonably necessary to give effect to the purpose and objective of the Act or the mandate of the Ministry. Therefore, while at one level the decision may exhibit some degree of

"justification, transparency and intelligibility," as the Divisional Court concluded, it fails to meet the test of "[falling] within *a range of possible, acceptable outcomes which are defensible* in respect of the facts and law" (emphasis added): *Dunsmuir* at para. 47.

[36] Section 51(1) must be read in light of the subsection that follows it. Both the Board and the Divisional Court erred, in my opinion, in declining to consider the provisions of s. 51(2) in the interpretation context. They appear to have done so because no one alleged that Blue Mountain had failed to comply with that provision. However, interpreting the two provisions together is instructive in showing how an overly broad interpretation of the reporting obligation in s. 51(1) can lead to consequences beyond the purposes of the Act.

[37] Section 51(2) requires that an injury site be preserved – shut down, in effect – until released by a Ministry inspector. There is evidence to suggest that closures to recreational sites such as ski and bike-riding slopes may create hazards to other skiers, bikers, and workers alike. The significantly intrusive effect of s. 51(2), combined with an overly broad interpretation of the notification and reporting requirements of s. 51(1), has the potential to give quite expanded powers to the Ministry and its inspectors.

[38] A consideration of some possible outcomes will bear this out. As the Supreme Court of Canada confirmed in *Canadian Pacific Ltd.*, at pp. 1044-45, the consideration of hypotheticals is useful when interpreting the meaning of legislation.

[39] Counsel for the Ministry conceded before the Board that on the Ministry's interpretation of the reporting section he could not think of any location in the province of Ontario, except perhaps an abandoned woodlot, that would not be classified as a workplace. In this Court, counsel and his client could not think of any examples. That is not a defensible outcome.

[40] Consider the following, as well.

[41] Mr. Den Bok acknowledged that if there were a critical injury to a hockey player or a spectator during a Toronto Maple Leaf hockey game at the Air Canada Centre, it would have to be reported to the Ministry. If the injury occurred on the ice, the hockey game would have to be shut down – televised or not – until the premises were released by a Ministry inspector. He took the same position with respect to a wide variety of other circumstances. For instance, he took the view that reporting to the Ministry would be mandatory in the case of customer injuries at a Canadian Tire Store or other retail outlet; in the case of injuries sustained by the public on highways patrolled by police (because the police or other workers may arrive after the accident, or may have passed by on a prior occasion); and in the case of worshippers who may suffer a heart attack or other critical injury at a religious institution (whether the services would have to be halted pending Ministry release of the place of worship, was left unsaid).

[42] One can envision endless examples that would be caught by the Board's interpretation, all without any causal relationship with a workplace safety issue. Would parents have to report to the Ministry if their child were injured at home because they had hired a nanny? Does a roller coaster become a "workplace" when a guest is injured while riding on it? Because hotel

employees enter guest rooms, does a hotel room become a "workplace" when a guest dies of a heart attack or a drug overdose, or is murdered?

[43] As noted above, where there are competing plausible constructions, a statute should be interpreted in a way that avoids absurd results: *Rizzo & Rizzo Shoes Ltd.*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 27; *Boma Manufacturing*, at para.109; and *Canadian Pacific*, at pp. 1081-82. In *Rizzo*, at para. 27, Iacobucci J. states that "[i]t is a well established principle of statutory interpretation that the legislature does not intend to produce absurd results."

[44] The consequences or results of the Divisional Court's and the Board's decision are incompatible with the objects of the Act and the enforcement provisions of s. 51(1), in my opinion. Their interpretation extends the scope of the Act and has the potential to give the Ministry and its inspectors significantly intrusive powers far beyond what is reasonably required to accomplish its purpose of preserving and promoting worker safety in the workplace. The interpretation is therefore unreasonable.

The Proper Interpretation of s. 51(1)

[45] That being the case, it falls to this Court to determine the proper interpretation of s. 51(1). In doing so, we must have regard to the words of that provision in their grammatical and ordinary sense and in their context, read harmoniously with the scheme of the statute as a whole, the purpose of the statute, and the intention of the legislature: *Rizzo* at para. 21; *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688 at para. 25; and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII), [2002] 2 S.C.R. 559 at para. 26.

[46] As I noted earlier in these reasons, the provisions of the Act are to be interpreted generously, but a generous approach to the interpretation of public welfare statutes does not justify a limitless interpretation of their provisions.

[47] With that in mind, I would not interpret the language of s. 51(1) of the Act in a way that would give it the almost limitless scope flowing from the interpretation adopted by the Board and the Divisional Court. Nor would I give it either the narrow interpretation favoured by the appellant, which would limit the application of the notice and reporting requirements only to situations where a worker is actually present at the scene of the occurrence, or the interpretation that a non-worker can never be a "person" within the meaning of s. 51(1).

[48] "Textually" speaking, taking the language of s. 51(1) of the Act at face value, the guest who died in the swimming pool might be seen as someone who died in a workplace. Blue Mountain has approximately 1,750 employees working at its 750-acre complex, and some of them may be in the pool area at some time during the day to perform maintenance services. The language of s. 51(1), read only in its grammatical and ordinary sense, is very broad.

[49] "Contextually" and "purposively" speaking, however, s. 51(1) is not engaged unless there is some reasonable nexus between the hazard giving rise to the injury and a realistic risk to worker safety issue at the pool or the resort.

[50] This restricted interpretation is consistent with the oft-cited observation of Lord Wensleydale in *Grey v. Pearson* (1857), 29 L.T.O.S. 67, at p. 71 (H.L.):

> In construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity or inconsistency, *but no further*. [Emphasis added.]

[51] It is also consistent with the principle that broad language in a statute may be given a somewhat restricted interpretation where necessary in order to avoid absurdity and to give the words their appropriate meaning, having regard to their context, the purpose of the Act, and the intention of the legislature. To quote Gonthier J. in *Canadian Pacific Ltd.*, at p. 1082:

> One method of avoiding absurdity is through the strict interpretation of general words … *Driedger on the Construction of Statutes* (3rd ed. 1994) states the relationship between the absurdity principle and strict interpretation as follows, at p. 94: 'Absurdity is often relied on to justify giving a restricted application to a provision'.

[52] It is within this framework, then, that the words "person", "from any cause" and "workplace" in s. 51(1) must be examined. In their submissions, the parties and intervenors focused on the meaning of the words "person" and "workplace." Certainly the contours of these words, particularly "workplace", need to be drawn. It seems to me, however, that the potentially all-embracing expression "from any cause" is the core phrase calling for a restrictive interpretation in order to give the language of s. 51(1) its proper meaning.

[53] I agree with the Board and the Divisional Court that the word "person" in s. 51(1) is not synonymous with "worker". Had the legislature intended that to be the case it would simply have used "worker" instead of "person". I think it is clear that the legislature intended the reporting requirement to extend beyond injuries to workers themselves and to encompass – as the Divisional Court observed in the passage cited above – "physical hazards with the potential to harm workers and non-workers alike." That is consistent with the purposes and objectives of the Act.

[54] But it does not follow that any death or critical injury involving any person at a place frequented, or sometimes frequented, by workers is caught by s. 51(1). To give the words "killed or critically injured *from any cause*" such an expansive interpretation may well lead to absurd results, as we have seen. That is why a reportable occurrence requires that there be some reasonable nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety at the site of the incident.

[55] This somewhat limiting interpretation of the words "from any cause" is key to the interpretation of s. 51(1). It is broad enough to capture "worker safety" related incidents and to give effect to the purpose of the Act. Yet it is not so broad as to lead to absurd consequences or to engage the intrusion of the state where that intrusion is unnecessary to achieve that purpose. It grounds the limiting interpretation of s. 51(1) in cause rather than location.

[56] That said, the death or critical injury with the required nexus to worker safety must still occur at a location the Act describes as a "workplace" Once the words "from any cause" have been given their proper meaning, however, the meaning of "workplace", as defined in the Act becomes clearer. To reiterate, "workplace" is defined as "any land, premises, location or thing at, upon, in or near which a worker works; ('lieu de travail')."

[57] The Board and the Divisional Court concluded that the word "works" in that expression was not confined to a place where a worker *is working*, but could extend to a place where a worker sometimes worked. I do not disagree that s. 51(1) may be engaged where no worker is present at the time the injury occurs. I would simply say that when the legislature referred to a place where "a worker works", it must have intended that place to be one where a worker is carrying out his or her employment duties at the time the incident occurs, or one where a worker might reasonably be expected to be carrying out such duties in the ordinary course of their work.

[58] This is consistent with the view that a "workplace" may not necessarily be a fixed location, but may in some circumstances travel with a worker, a view that makes some sense in today's world of mobility, and which the parties appear to accept: see *R. v. Port Colborne (City)*, [1992] O.J. No. 2555 (C.J.).

[59] In summary, the notification and reporting requirements of s. 51(1) of the Act are engaged where:

> a) a worker or non-worker ("any person") is killed or critically injured;
>
> b) the death or critical injury occurs at a place where (i) a worker is carrying out his or her employment duties at the time the incident occurs, or, (ii) a place where a worker might reasonably be expected to be carrying out such duties in the ordinary course of his or her work ("workplace"); and
>
> c) there is some reasonable nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety at that workplace ("from any cause").

[60] The guest drowning in the Blue Mountain swimming pool does not meet the foregoing criteria.

[61] There was no evidence that the Blue Mountain guest's death in the swimming pool was caused by any hazard that could affect the safety of a worker, whether present or passing through. All that is known is that the guest either had a heart attack (the first diagnosis) or drowned while swimming (the final report). The purpose of the Act is to further worker safety; it is not to capture death by natural causes. If there is a need for supervision at the pool to ensure the safety of Blue Mountain's guests, that may raise other issues for Blue Mountain, but it does not give rise to considerations of worker safety. It is highly unlikely that a Blue Mountain employee is going to drown while swimming in the pool in the course of his or her employment duties.

[62] The interpretation I place on s. 51(1) is consistent with the Act's purpose and objective of protecting the health and safety of workers. It anchors worker safety to a hazard with the potential to harm workers, thereby placing some constraints on the scope of the notification and reporting requirements of the Act. By doing so, it also honours the legislative and external context in which those requirements operate.

[63] Part of the context within which s. 51(1) must be interpreted is reflected in the history of the legislation. The *Occupational Health and Safety Act* came into effect in 1978. It repealed a number of then-existing pieces of legislation dealing with the protection of workers in factories and mines and on construction sites, and consolidated them into one Act. The history behind the legislation was conveniently summarized by this Court in *R. v. Wyssen* reflex, (1992), 10 O.R. (3d) 193 (C.A.), at p. 198-99:

> The Act was passed in 1978.... Intense public discussion of industrial safety was stimulated by the 1976 Report of the Royal Commission on the Health and Safety of Workers in Mines (the Ham Report). Bills relating to industrial safety were introduced in the legislature in 1976, 1977 and 1978 when the Act was finally passed. The object of the legislative proposals was to achieve safety in the workplace and their scope greatly expanded before the Act was passed in 1978.
>
> The statute was described by the Minister of Labour as a "comprehensive omnibus act which would consolidate all existing occupational health and safety legislation": Debates, Legislative Assembly of Ontario, October 18, 1977, p. 856. The Act repealed five statutes and parts of two others dealing with occupational health and safety. The statutes, which the Act replaced, were limited almost completely to the protection of employees with only minimal expansion of protection beyond the common law master and servant relationship.

[64] The legislation that the Act replaced focused on the safety of workers in workplaces such as factories, shops, offices, mines and construction sites. While I think it is evident that the scope of the present Act is not confined to industrial or commercial sites of that nature, it is instructive to keep those roots in mind. In any event, the emphasis of the present Act is clearly on protecting the safety of workers in the workplace, a purpose that was confirmed by this Court in *R. v. Timminco*, at para. 22:

> The broad purpose of the statute is to maintain and promote a reasonable level of protection for the health and safety of workers in and about their workplace.

[65] It follows that it is not part of the purpose and objective of the Act to protect non-workers. The focus is on the worker, the employer and the workplace, and injuries that pose a risk in that connection.

Conclusion and Disposition

[66] For the reasons I have explained, the interpretation given to s. 51(1) of the Act by the Board and the Divisional Court was unreasonable. Therefore it cannot stand. I would interpret s. 51(1) to provide that the Ministry must be notified of a death or critical injury at a site, and the requisite report provided, where there is some reasonable nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety at a workplace. A workplace is where (i) a worker is carrying out his or her employment duties at the time the incident occurs, or, (ii) where a worker might reasonably be expected to be carrying out such duties in the ordinary course of his or her work.

[67] It may be that a literal reading of s. 51(1) would suggest a broader interpretation. In spite of that, however, the decisions below would lead to absurd results and accordingly do not "[fall] within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, at para. 47. The interpretation I adopt conforms to the purpose and objective of the Act and is consistent with the provisions of the Act read as a whole, even if the words of s. 51(1) alone may suggest the alternative interpretation: *Boma Manufacturing Ltd.*, at para. 109.

[68] Accordingly, I would allow the appeal, set aside the decision of the Divisional Court and allow the application for judicial review. In the result, the order of inspector Den Bok requiring Blue Mountain to report to the Ministry the death of the Blue Mountain guest in the swimming pool on December 24, 2007, is also set aside.

[69] The appellant is entitled to its costs of the appeal, payable by the respondent Ministry of Labour, and fixed in the amount of $5,000 inclusive of disbursements and all applicable taxes. There will be no costs with respect to the Board or the intervenors.

3893-11-R (Court File No. DC-12-010) **Bur-Met Contracting Ltd.** and Carpenters District Council and Ontario Labour Relations Board

Construction Industry – Judicial Review – Practice and Procedure – Stay – The applicant brought a motion for an interim order to stay the decision of the Board pending judicial review – The Court applied the following three-part conjunctive test: (1) a strong *prima facie* case for review on the merits of the application; (2) irreparable harm if the stay is not granted; and (3) the balance of convenience favouring granting the stay – The Court

concluded that the applicant failed to establish a strong *prima facie* case for review on the basis of a lack of procedural fairness – The Court held that: (1) there was adequate notice of the hearing; (2) the Board allowed the applicant ample opportunity to explain why the hearing should not commence in Toronto; (3) the Board gave the applicant numerous opportunities to explain why certain documents should not be produced; (4) sections 1(5) and 69(13) dealt with an obligation to produce evidence, not reverse onus, and thus, were not unconstitutional – Regarding irreparable harm, the Court did not find there was sufficient evidence to make this conclusion – The Court did state, however, that the balance of convenience was in favour of granting the stay because there were other applications before the Board based on the decision at issue, which negatively affected the applicant and had no impact on the respondents – Nonetheless, the motion was dismissed

Superior Court of Justice (Divisional Court), McCartney J., January 16, 2013

Decision

[1] This is a motion for an interim order to stay the decision of the Ontario Labour Relations Board (OLRB) dated September 6, 2012. The decision was the result of an Application by the Respondents the Carpenters District Council, United Brotherhood of Carpenters and Joiners of America, Local 1669 (the Carpenters Union) against the Applicants in the present motion (Bur-met). The Board made the following finding:

a) declares, pursuant to subsection 1(14) of the Act, that Bur-Met Contracting Ltd., Bur-Met Northern Ltd., CWS Construction Ltd., Overall Plastering Ltd., and Woodcrest Construction Limited are one employer for the purposes of the Act; and

b) declares that Bur-Met Contracting Ltd., Bur-Met Northern Ltd., CWS Construction Ltd., Overall Plastering Ltd., and Woodcrest Construction Limited are bound to the Carpenters' Provincial ICI Agreement, to the Non-ICI, and to the EPSCA Agreement.

[2] By Notice of Application dated October 1, 2012, the Applicants herein (Bur-Met) commence proceedings for judicial review of the OLRB's September 6, 2012 decision, along with the companion decision of August 9, 2012. Three similar Applications which resulted from the September 6, 2012 decision are set for hearing before the OLRB on Friday January 18, 2013. Consequently, Bur-Met wishes to stay the decision of September 6, 2012 pending the judicial review.

[3] There is a three part conjunctive test which must be satisfied by the moving party before an interim stay can be granted. That test is as follows:

1. A strong prima facie case for review on the merits of the Application for judicial review. The standard of review in such a review being reasonableness.

2. The Applicant would suffer irreparable harm if the stay is not granted.
3. The balance of convenience favours the granting of the stay.

See Sobeys Inc. v. U.F.C.W. Local 1000a reflex, [1993] 12 O.R. (3d) 157

See Dunsmuir v. New Brunswick [2008] S.C.C. 9

A Strong Prima Facie Case for Review

[4] Even though Bur-Met did not provide a factum on the motion, it can be gleamed from the draft factum filed on the judicial review, and from submissions by counsel, that lack of procedural fairness was the main complaint of the decision of the OLRB because:

i. Sixty nine day Notice of Hearing is not adequate

ii. The Board improperly refused an adjournment request – and refused to hold a hearing in Thunder Bay.

iii. It is alleged that the Board exceeded is jurisdiction by ordering production of numerous documents without considering their relevancy

iv. Section 1(5) and 69(13) of the *Ontario Labour Relations Act* are reverse onus provisions and thus unconstitutional.

[5] Regarding (i.) above sixty nine days would seem to me to be adequate notice, at least to set a date to commence a hearing.

[6] Regarding (ii.) above Bur-Met's position does not appear to be correct. The whole matter was dealt with at an earlier hearing on August 15, 2012. The decision on that date, a portion of which is repeated in the September 6, 2012 decision would indicate that as long as the hearings commenced on the first fixed date i.e. August 21, 2012, then thereafter, not only would consideration be given to continuing the hearings in Thunder Bay, but the Carpenters Union would agree to this. Furthermore, the OLRB indicated that Bur-Met was still at liberty to give reasons why the hearings could not start in Toronto on August 21 – but since there was no further communication, the matter proceeded in Toronto on August 21, with no one appearing for Bur-Met. I fail to see how under these circumstances one would conclude any procedural unfairness.

[7] Regarding (iii.) above, the OLRB decision of July 27, 2012 would seem to explain what happened. On that date the OLRB dealt with a request from the Carpenters Union for production – and the refusal by Bur-Met's counsel to produce any documents. The OLRB thereupon made an order that Bur-Met explain why the demanded productions were inappropriate having regard to the issues in the case by August 2, 2012. When no response was received, the Board on August 9, 2012 ordered the requested documents be made available to the Carpenters Union in Thunder Bay by August 16, 2012. Apparently no documents were ever produced. Since the Board had ordered Bur-Met to produce certain documents or explain why they should not, and

having received no response whatsoever, Bur-Met was in no position to complain that it was not given the opportunity to set out its position on production – nor to refuse to deliver any production based on relevancy.

[8] Finally, with respect to (iv.) above Bur-Met states that section 1(5) and section 69(13) of the *Ontario Labour Relations Act* (the basis for the production order) are unconstitutional since they set up a reverse onus requiring businesses, when they are under common control – or when a business bound by a collective agreement sells, to adduce facts at the hearing material to the allegation. However, as was pointed out these sections deal with an obligation to produce evidence not a reverse legal onus, and thus should not be considered unconstitutional.

[9] For all of the above reasons, I find that the Respondent Bur-Met has not established a strong prima facie case for review.

[10] Even though my finding that Bur-Met has failed to establish a strong prima facie case disposes of the motion, I will deal briefly with the other 2 parts of the test.

Irreparable Harm

[11] The second part of the test states that the applicant must establish that irreparable harm i.e. harm that cannot be compensated for in damages would occur if relief were not granted. There is not sufficient evidence before me to be able to conclude irreparable harm if the relief were refused.

Balance of Convenience

[12] In this third part of the test, the court is to consider which party would suffer the greater harm from the granting or refusal of the order. Since it appears clear that other applications are presently before the Board based on the September 6, 2012 ruling, the results of which could clearly negatively affect Bur-Met, and since nothing further can happen to the Carpenters Union until the results of the judicial review are known, the balance of convenience here seems to be in favour of Bur-Met.

[13] For all of the above reasons, the motion is dismissed.

Costs

[14] Carpenters Union has asked for costs in the amount of $7,500.00. While I feel they are entitled to costs herein the amount requested is excessive. Costs are fixed at $3,500.00 all inclusive to be paid by the Applicants to the Carpenters Union.

3894-09-G (Court File No. 513/11) C.W. Smith Crane Services Ltd., v. I.U.O.E. Local 793 and the Ontario Labour Relations Board

Construction Industry Grievance – Judicial Review – The employer brought an application for judicial review challenging the Board's decision on the meaning of the term "manufacturer's rating" in the collective agreement – The Board interpreted the term within the context of the collective agreement to hold that the purpose of the provision was to focus on the maximum capacity, rather than the performance, of the crane – The Divisional Court affirmed that the standard of review is reasonableness as conducting a contextual interpretation of a term in a collective agreement is part of the expertise of a labour arbitrator – The Court found that the Board's decision was reasonable based on the conclusion and reasons for it – The Board was not required to interpret the term in the same way as similar terms in safety regulations – Application dismissed

Superior Court of Justice W.L. Whalen, A.M. Molloy, and K.E. Swinton JJ., January 18, 2013.

The judgment of the Court was delivered by

[1] A.M. MOLLOY J.:-- This application for judicial review challenges a decision of the Ontario Labour Relations Board ("the Board"), acting as an arbitrator in a grievance under a Collective Agreement in the construction industry. The central issue in the Board's decision is the meaning of the words "manufacturer's rating" in Article 26.1 of the Collective Agreement between the parties. Depending on how that term is interpreted, a particular brand and model of crane used by the employer may require two operators instead of one.

[2] There was no evidence before the Board that the expression "manufacturer's rating" is a defined term of art in the construction industry. It is also not defined in the Collective Agreement. Accordingly, the Board interpreted the term within the context of how it was used in the Collective Agreement, the necessary meaning of similar sections of the same Collective Agreement, applying what he described as a "purposive analysis" of that article of the Collective Agreement.

[3] The task of conducting a contextual interpretation of a term in a Collective Agreement is part of the core expertise of a labour arbitrator. As such, it is entitled to deference and the standard of review is that of reasonableness: Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, 2008 SCC 9.

[4] The Board reviewed various documents and theories that would support the interpretation advanced by the employer that the manufacturer's rating for this particular crane, when properly interpreted, was 82.5 tons, which would mean that only one operator was required. The Board also reviewed various documents and theories, and in particular various provisions of the Collective Agreement advanced by the union that the manufacturer's rating, when properly interpreted, was 110 tons, which would mean two operators were required.

[5] There were compelling arguments advanced for both sides and either interpretation had some evidence to support it. Ultimately, the Board relied more extensively on the Collective Agreement itself, including provisions other than Article 26.1. The Board concluded that the union's proposed interpretation was the correct one. In particular, at paragraphs 18-19 of the decision, the Board concluded that the purpose of the Article at issue was to focus on the

maximum capacity of the crane, rather than its actual performance. He therefore held that the appropriate interpretation of "manufacturer's rating" should focus on the maximum capacity, regardless of whether the special equipment required for the crane to perform at that level had been purchased by the employer, or even produced by the manufacturer. Accordingly, he determined the maximum capacity of this particular crane was 110 tons.

[6] In coming to that conclusion, the Board clearly articulated his line of reasoning and why it chose the option it did. The conclusion it reached was a reasonable one in all of the circumstances. It is not for this court to provide our own interpretation of the provision, nor is it necessary that the interpretation of the term as used in the Collective Agreement term be the same as similar terms used in safety regulations. We find that the Board's decision is a reasonable one, both in respect of the articulation of reasons and the conclusion reached.

[7] Accordingly, this application is dismissed, with costs to the respondent Union fixed at $7500.00. The Labour Relations Board does not seek costs.

4045-06-U (COURT FILE NO. 431/08) **Khaiter** and Ontario Labour Relations Board.

Delay – Judicial Review – The Faculty Association brought a motion for the court to dismiss four judicial reviews for delay as Mr. Khaiter, a member of the faculty of York University, had failed to set down any of the matters to be heard – These matters all relate to Mr. Khaiter's allegations that YUFA has failed to represent him fairly, which he brought to the OLRB and the HRTO – The Court noted that no date had yet been set to hear any matter and that the delays ran from two years and three months to over five years since the respective tribunal had issued its decision – The court found the delay occasioned by the failure to set any of the applications down for hearing made it clear that the delay was unacceptable – The issue then turned on whether this delay prejudiced YUFA – The court noted that the events giving rise to the original complaints go back years; "that the issues relate to employment" and that "to try and undertake these proceedings now would be disruptive and the validity of the results uncertain" – The court found the presence of prejudice obvious – The court noted however that it was uneasy dismissing the applications based on the evidence of delay, particularly because YUFA could have filed the Hearing Request Form and forced a hearing date – The court considered other factors – First it noted that Mr. Khaiter has been misusing the processes that the Board and the HRTO offer for a purpose not related to resolving the disputes at hand and that the delay in processing the four applications for judicial review is demonstrative of the same attitude and consistent with an effort to keep these disputes alive rather than bringing them to a conclusion – Second, he did not have a satisfactory explanation for the delay – The court concluded that by carrying these matters as he has, Mr. Khaiter delayed too long and lost or, by his actions, gave up the right to have the four applications for judicial review heard on the merits – Motion granted, applications dismissed

Superior Court of Justice (Divisional Court), Lederer J., February 20, 2013

LEDERER J.:

Introduction

[1] Those who come to court are free to act on their own behalf. The right to appear brings with it the responsibility to respect the process of the court and to act within its rules. Coming to court includes the attendant obligation to be familiar with and make some effort to understand that process and those rules. A proceeding in court is not a game where the tactics of the individuals taking part can be used to overrun the business at hand.

[2] This is a motion brought by the respondent, the York University Faculty Association ("YUFA"), to dismiss four judicial reviews brought by the applicant, Peter A. Khaiter. Peter A. Khaiter has failed to set any of the four judicial reviews to be heard. He appears to have thought that this delay would be to his advantage. A cross-motion, the substance of which confirms the applicant's opposition to the dismissal, was also before the court.

Background

[3] Peter A. Khaiter is a member of the faculty of York University. He has, for many years, been battling with YUFA, of which he is a member. In short, he believes that YUFA has failed in its responsibilities to him in respect of certain disputes he had and continues to have with the University. As Peter A. Khaiter sees it, YUFA has failed to represent him and is engaged in a conspiracy with the University against him. This ongoing dispute has taken Peter A. Khaiter to hearings before the Ontario Labour Relations Board and the Ontario Human Rights Tribunal of Ontario. While there are four applications for judicial review before the court, they concern seven decisions of the Ontario Labour Relations Board, in respect of ten complaints, made against YUFA by Peter A. Khaiter for failure to fairly represent him, and two decisions of the Human Rights Tribunal of Ontario in respect of a complaint of discrimination. The claim was of discrimination based on ancestry and place of origin. In each case, the decision of the tribunal has dismissed the complaint.

[4] In response, Peter A. Khaiter has commenced the four applications for judicial review. In each case, the application has been ongoing for some time:

- Court File No.: 431/08: The three decisions which are the subject of this application were made by the Ontario Labour Relations Board in July 2007, December 2007 and March 2008. The first of these was a procedural decision; the second, a decision summarily dismissing the complaints; and the third, a dismissal of a request for re-consideration. The application for judicial review was commenced on August 26, 2008, six months after the decision not to re-consider. It was perfected a year later, on or about August 28, 2009.

- Court File No.: 456/09: This application considers the two decisions of the Human Rights Tribunal of Ontario. They were made on November 7, 2008 and

April 3, 2009. The first was the decision dismissing the complaint; and the second, the decision dismissing the request for re-consideration. The application for judicial review was commenced on October 1, 2009, six months after the decision not to re-consider. It was perfected six months later on April 7, 2010.

- Court File No.: 383/10: These two decisions of the Ontario Labour Relations Board were made on January 6, 2010 and June 18, 2010. The first was a procedural ruling; and the second, a decision dismissing the two complaints. The application for judicial review was commenced on July 27, 2010, five weeks after the dismissal of the complaint. It was perfected a year later on August 18, 2011.

- Court File No.: 213/11: These two decisions of the Ontario Labour Relations Board were made in July 2010 and on October 27, 2010. The first concerned two procedural decisions; and the second, a decision dismissing the complaints and finding that Peter A. Khaiter was a vexatious litigant. The application for judicial review was commenced on April 26, 2011, six months after the dismissal of the complaints. It was perfected over a year later, on or about May 16, 2012.

[5] In each case, upon perfection, the Court delivered a Notice of Listing for Hearing accompanied by a Hearing Request Form to the parties. The former advised that the application had been perfected and provided an "approximate date for hearing" The latter required the parties to advise the court of dates on which they would be available and the estimated time the hearing would take. The approximate dates for hearing were as follows:

- Court File No. 431/08: October 2009/November 2009

- Court File No. 456/09: June/September 2010
- Court File No. 383/10: November 2011/December 2011
- Court File No. 213/11: June/September 2012

[6] As of the day this matter has come to court (January 25, 2013), no Hearing Request Form has been received by the court, no date for hearing has been set and none of these judicial reviews has been heard. It will be readily apparent that these matters have been substantially delayed. If they were heard today, it would be:

- for Court File No. 431/08: over five years since the decision of the Ontario Labour Relations Board dismissing the Applicant's complaints and four years and ten months since the dismissal of his request for re-consideration;

- for Court File No. 456/09: over four years since the decision of the Human Rights Tribunal of Ontario dismissing the Applicant's complaint and three years and nine months since it dismissed his request for re-consideration;

- for Court File No. 383/10: two years and seven months since the Ontario Labour Relations Board dismissed the Applicant's complaints; and,

- For Court File No. 213/11: two years and three months since the Ontario Labour Relations Board dismissed the Applicant's complaints.

Analysis

Delay

[7] The moving party, YUFA, brings these motions requesting that the Court exercise its discretion and dismiss each of the four applications for judicial review. It relies on the delay in these matters being set down to be heard. In *15202437 Inc. (c.o.b. Pro Pipe Construction) v. Ontario Pipe Trades Council,* [2010] O.J. No. 5615 (Div. Ct.), the judge referred to the statement of law concerning delay in judicial review applications found in *Ransom v Her Majesty the Queen,* 2010 ONCS 3156 (CanLII), including:

> 1. Judicial review is a discretionary remedy and can be denied if there has been excessive delay: *International Union of Bricklayers and Allied Craftworkers v. Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers* reflex, (2000), 132 O.A.C. 87 at para. 18 (Div. Ct.); *Jeremiah v Ontario Human Rights Commission,* [2008] O.J. No. 3013 (Div. Ct.).
>
> 2. In determining whether to dismiss an application for delay, the court will consider the length of the delay, whether there is a reasonable explanation for the delay and whether the moving parties have suffered prejudice as a result of the delay: *Gigliotti v. Conseil d'Administration du Colleges des Grands Lacs,* [2005] O.J. No. 2762. Some cases suggest that the merits of the application may also be taken into account.
>
> 3. This Court has held on many occasions that a delay of more than six months in commencing a judicial review application is reason for concern: *Gigliotti* at para. 29; *Jeremiah* at para. 45.
>
> *(15202437 Inc. (c.o.b. Pro Pipe Construction) v. Ontario Pipe Trades Council, supra,* at para. 3)

[8] Counsel for YUFA submitted that Peter A. Khaiter was aware that delay was an issue that would be relied on as these matters moved forward and, yet, he has taken no steps to schedule any of the four applications for a hearing.

[9] Three of the four applications were perfected only as, or after, Peter A. Khaiter was notified by the Court that each of those applications would be dismissed if it was not perfected by a date fixed in each of the three notices (Court File No. 431/08, Court File No. 383/10 and Court File No. 213/11). In each of the four facta that have been filed in response, YUFA put Peter A. Khaiter on notice that his delay in proceeding with the application was an issue.

[10] On October 8, 2009, after only the earliest of the four applications had been perfected, counsel for YUFA wrote to Peter A. Khaiter and indicated that it considered the second of the four applications to be untimely (Court File No. 456/09). The letter advised that, once the application had been perfected, a motion would be brought to have it dismissed for delay.

[11] Two years later, on September 12, 2011, approximately three weeks after Peter A. Khaiter had perfected the third application, counsel for YUFA sent a letter to Peter A. Khaiter

containing the information he would need to complete the Hearing Request Form, including available dates and the time estimated for oral argument. Rather than take notice of the concern expressed by counsel for YUFA or fill out and send in any of the Hearing Request Forms, Peter A. Khaiter refused to do so claiming that the hearing could not be scheduled until he had received the responding factum of YUFA. This is not correct. The *Rules of Civil Procedure* make clear that, when the certificate of perfection has been filed, the registrar shall place the application on a list for hearing and give notice of the listing for hearing, by mail, to the parties (see: Rule 68.05 (2)). The filing of a Hearing Request Form is a peculiarity of Divisional Court practice in Toronto. The purpose is to ensure that counsel will be available on the date selected. It responds to the volume of work the Court confronts in Toronto. This requirement does not change the reality that applications for judicial review, upon being perfected, are accepted as being ready to be set down for a hearing. As observed at the outset of these reasons, the fact that Peter A. Khaiter is not a lawyer does not excuse him from making some effort to understand the rules and process of the court. In this case, counsel for YUFA wrote to Peter A. Khaiter and advised that there was "...nothing that should delay you in scheduling the hearing" as it was "...presumed that an Applicant will schedule the hearing before receipt of the respondents factums." Rather than adhering to the advice of counsel or making any effort to confirm its accuracy, Peter A. Khaiter wrote back repeating that counsel had not indicated the date by which a factum would be served. I return again to what was said at the outset. Tactics that ignore the rules cannot offset the proper process of the court. In this case, even after October 7, 2011, the day the factum, on behalf of YUFA, was provided in the third proceeding, Peter A. Khaiter made no effort to prepare the Hearing Request Form or have the matter set down to be heard.

[12] Peter A. Khaiter took a similar approach with respect to the fourth of the applications for judicial review (Court File No. 213/11). On June 21, 2012, little more than a month after he had perfected this application, Peter A. Khaiter sent an e-mail to counsel for YUFA asking why a responding factum had not been filed within thirty days of the service of his material. Counsel responded by asking what steps had been taken to complete the Hearing Request Form and indicating a willingness to cooperate in scheduling the date for the hearing. In the same e-mail, counsel asked Peter A. Khaiter to schedule hearings for each of the other three applications:

> We also note that you have filed a number of other applications for judicial review that have been listed for hearing but for which you have not made any attempt whatsoever to complete the Hearing Request Form and schedule for a hearing date. We have given you a reasonable time for doing so, notwithstanding that delay is significantly beyond that expected for any applicant. We will be relying upon your delay in setting those applications down for hearing when they're eventually heard, and we may bring a motion to have the applications dismissed for delay if they are not scheduled for hearing shortly.

[13] In the face of all of this, Peter A. Khaiter has done nothing to move any one of these applications to a hearing. The question is whether the delay this has caused is sufficient for me to exercise the discretion of the court and dismiss the four applications for judicial review. Peter A. Khaiter failed to respond to the advice of YUFA that its concern for the delay would be raised in court. He relied on positions that had no merit as the reason for not doing so. The delay ranges from four years and ten months (Court File No. 431/08) to two years and three months (Court

File No. 213/11). In the context of applications for judicial review, this is well beyond what would typically be thought of as appropriate or proper:

> Indeed, the Divisional Court has held on numerous occasions that delay on the part of an applicant of six or more months in the commencement of an application and/or twelve or more months in the perfection of an application could be serious enough alone to warrant the dismissal of the application.
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> (*Gigliotti v. Conseil d'Administration du Colleges des Grands Lacs*, *supra*, at para. 30, quoting *Bettes* v. *Boeing Canada/DeHavilland*, [2000] O.J. No. 5413 (Div. Ct.), at para. 7)

[14] Only one of the four applications for judicial review being considered was commenced within six months and none was perfected in less than a year from the date of the decision sought to be reviewed. The delay occasioned by the failure to set any of the applications down for hearing exacerbates the issue and makes clear that the delay is unacceptable.

Prejudice

[15] With unacceptable delay established, the question remains whether the delay has prejudiced YUFA, the respondent in the four applications for judicial review. There is no requirement for a demonstration of actual prejudice, it can be presumed. In a case involving a delay in a hearing or trial, prejudice is often expressed in terms of the impact the delay will have on the evidence. Do all the witnesses remain available? What would be the impact on their memories? This is not a factor on judicial review. In the matter before this court, the issue reflects on the impact the case could have if it is allowed to proceed. Given the passage of time, what is the point in hearing these applications now:

> Finally, in the exercise of the Court's discretion it is proper to consider whether any useful purpose whatsoever would be accomplished by setting aside the recommendation and all proceedings hereto before the board.
>
> (*Gigliotti v. Conseil d'Administration du College des Grands Lacs* 76 O.R. 561, [2005] O.J. No. 2762, at para. 33, quoting *R. v. Board of Broadcast Governors*, [1962] O.R. 657, 33 D.L.R. (2d) 449 (C.A.))

[16] These matters concern the relationship of an employee to his employer and to the union that represents him:

> In an employment context, delay is particularly troubling given the need to resolve work place issues promptly and avoid lingering disharmony: *Amodeo v. Ontario (Ministry of Labour)*, [2010] O.J. No. 1200 (Div. Ct.); *Ontario Public Service Employees Union v. Ontario (Ministry of Labour)*, [2001] O.J. No. 1037 (Div. Ct.); *Patel v. Ontario (Labour Relations Board)*, [1998] O.J. No. 571 (Div. Ct.).
>
> (*Ransom v. Her Majesty the Queen, supra,* at para. 16, as referred to in *15202437 Inc. (c.o.b. Pro Pipe Construction) v. Ontario Pipe Trades Council, supra,* at para. 3; and see

also: *Dayco (Canada) Ltd. v C.A.W.- Canada* 1993 CanLII 144 (SCC), (1993), 10? D.L.R. (4th) 609 at 660-661 (S.C.C.) per Cory J.)

[17] In *Ransom v. Her Majesty the Queen, supra,* the judge concluded that while there was no evidence of actual prejudice, taking into account the length of the delay and the remedy being sought, "… a certain degree of prejudice [was] obvious" (see: para. 18). Mr. Ransom was an instructor at a police college. He sought re-instatement. The judge observed that a lot had changed in policing in the eight years since Mr. Ransom had been removed from his job. Further, there would be disruption to staff members who had been in place for the years since his departure. Finally, the judge noted that, with the acrimony which had built up between the parties in the intervening period, a smooth transition back to the workplace could not be expected. On this basis, the judge held that there had been prejudice to the respondents as a result of the delay (see: paras. 19, 20 and 21).

[18] In this case: what would be the outcome of overturning decisions saying that YUFA did not breach its responsibility to properly represent Peter A. Khaiter? As in *Ransom,* taking into account the time that has passed, it is too late to set those decisions aside on judicial review and send them back to the Ontario Labour Relations Board and the Human Rights Tribunal of Ontario. If Peter A. Khaiter is successful, he can be expected to ask that the parties go back and re-examine the outcome of the underlying disputes he had with his employer, York University. If this was the intended outcome, it should have been done more quickly. Too much time has gone by. It should be remembered that the events which gave rise to the proceedings which are the foundation of the complaints of Peter A. Khaiter go back years before the complaints were made. By way of example, it was on November 17, 2003 that Peter A. Khaiter notified York University that he was filing the grievance that led to the second of the four applications for judicial review (Court File No. 456/09). The actual cause of, or catalyst for, the complaint would have taken place even earlier. There is prejudice. The issues relate to employment. To try and undertake these proceedings now would be disruptive and the validity of the results uncertain. The time that has passed and the practical difficulties that would ensue make the presence of prejudice "obvious" (see: para. [17], above).

[19] Even with all of this, I would feel a measure of unease in dismissing these applications based on the evidence of delay. The Hearing Request Forms were, and typically are, sent to all parties. The forms are neutral. They are not directed to one side or the other. The obligation to file the form is shared between the parties. In this case, YUFA concentrated on advising Peter A. Khaiter that he had a responsibility to arrange for a hearing date to be set and informing him that delay would be an issue before the court. It did little on its own to get these applications set down. It told Peter A. Khaiter to do it and then waited to raise the issue of delay. The longer the delay the stronger its position became. It could have done what it did when Peter A. Khaiter failed to respond to its request to set dates for the hearing of this motion. Counsel for YUFA could have written to the Court advising of the difficulty and of dates it was available. It does not seem unreasonable to propose that the Court would have done for the applications for judicial review what it did for this motion. Pursuant to the direction of the administrative judge of the Divisional Court, Peter A. Khaiter was told to select one of three dates. He did not. The hearing took place on the default date appointed by the judge in the event that Peter A. Khaiter did not

select a date. In short, the failure of YUFA to attempt to set the matter down for hearing contributed to the delay. For this reason, I would be uneasy dismissing the applications for judicial review based only on the delay.

Other Considerations

[20] As it is, there is more to this than just the delay. There are other considerations that should be borne in mind. In the circumstances, one has to wonder why Peter A. Khaiter would not have prepared the Hearing Request Forms and set down the four applications to be heard. There is an answer that sheds light on his purpose. Peter A. Khaiter made another separate human rights complaint against York University. YUFA intervened. The Human Rights Tribunal of Ontario made a decision, dated September 21, 2010. In the decision, the Adjudicator observed that Peter A. Khaiter believed that York University planned to fire him and that he was, therefore, attempting to tie up the University in legal proceedings so that it would not be able to do so:

> At the hearing the applicant explained to me that he had engaged in a strategy of taking every possible legal avenue available to him because he believed that, so long as he keeps the University tied up in litigation, it will be unable to fire him. That he believes he is at risk of having his employment terminated is a central theme in the applicant's analysis of the ongoing workplace dispute. In his view the University has, from almost the moment it hired him, been conspiring to fire him because of his ethnic origin and place of origin.
>
> (*Peter Khaiter v. York University, Barry Miller and Rhonda Lenton* 2010 HRTO 1901 (CanLII), 2010 HRTO 1901, at para. 42)

[21] This is not an approach the Court or the two tribunals could condone. It is a misuse of their processes. That this approach is being undertaken by Peter A. Khaiter is confirmed by the decisions of the Ontario Labour Relations Board and the Human Rights Tribunal of Ontario. They suggest that Peter A. Khaiter has acted to complicate and draw-out the process.

[22] In the decisions leading to the third of the applications for judicial review (Court File No.: 383/10), the Ontario Labour Relations Board, at the end of its reasons, included a paragraph entitled, "Abuse of Process", in which it said, in part:

> The Board can understand the frustration of dealing with the applications in these matters. The Applicant in these two present applications made 15 separate sets of submissions totalling 811 pages.
>
> (*Khaiter v. Association*, 2010 CanLII 49187 (ON LRB), 2010 CanLII 49187 (ON LRB), at para. 83)

[23] This followed an observation made by the Ontario Labour Relations Board in a decision leading to the first of the four applications for judicial review (Court File No. 431/08) commenting on the volume of material and the general failure of Peter A. Khaiter to plead facts that supported his assertion that YUFA has failed to properly represent him:

> The six applications are voluminous but with the limited exception of Board File No. 0467–07–U, the applicant has failed to particularize his allegations or plead any facts to support his assertion that YUFA has contravened section 74 of the Act. The applicant has appended numerous electronic messages which record his interactions with YUFA and notes from the meeting which he had with YUFA on January 29, 2007.
>
> (*Khaiter v. Association (YUFA)*, 2007 CanLII 55931 (ON LRB), 2007 CanLII 55931 (ON LRB), at 27)

[24] It should be said that this complaint reflects on the decision of YUFA not to file twelve new grievances on behalf of Peter A. Khaiter.

[25] The misuse of the process of the Ontario Labour Relations Board came to a head in a decision leading to the fourth of the applications for judicial review:

> I have reviewed the substantive decisions issued by the Board in the eight previous duty of fair representation complaints [Peter A. Khaiter] has filed against the Union before the Board. Those decisions are: *Khaiter v. Association*, 2010 CanLII 49187 (ON LRB), 2010 CanLII 49187 (ON LRB), 2010 CanLII 49187 (ON LRB), 2010 CanLII 49187 (ON L.R.B.); *Khaiter v. Association*, 2008 CanLII 45271 (ON LRB), 2008 CanLII 45271 (ON LRB), 2008 CanLII 45271 (ON LRB), 2008 CanLII 45271 (ON L.R.B.); *Khaiter v. Association (YUFA)*, 2008 CanLII 10035 (ON LRB), 2008 CanLII 10035 (ON LRB), 2008 CanLII 10035 (ON LRB), 2008 CanLII 10035 (ON L.R.B.) *Khaiter v. Association (YUFA)*, 2007 CanLII 55931 (ON LRB), 2007 CanLII 55931 (ON LRB), 2007 CanLII 55931 (ON LRB), 2007 CanLII 55931 (ON L.R.B.) and *Khaiter v. Association (YUFA)*, 2007 CanLII 30285 (ON LRB), 2007 CanLII 30285 (ON LRB), 2007 CanLII 30285 (ON LRB), 2007 CanLII 30285 (ON L.R.B.). In each of the applications in which those decisions were issued, the Board decided that the application had not established a prima facie case for the Board to inquire into.
>
> On the basis of the material filed by the [Peter A. Khaiter] and [YUFA], in light of the history of [Peter A. Khaiter's] litigation before the Board, the Board has concluded the following regarding [Peter A. Khaiter]. He has brought multiple applications making substantially the same allegation that [YUFA] has violated section 74 of the Act in its representation of him because it acted in a manner that was discriminating, harassing and humiliating. He has consistently sought relief that the Board would not conceivably grant. The issues raised in the earlier applications have been rolled into later applications, including these two applications. [Peter A. Khaiter] has made unreasonable and unjustifiable aspersions against the lawyers representing [YUFA], and against its officials and representative, and against the adjudicators and the officers of the Board. [Peter A. Khaiter's] repeated use of the Board's procedures has severely harassed [YUFA] and its officials, putting it to considerable unnecessary cost. Chiefly, though, the Board and its resources have been expended, through time, work and effort on what amount to a series of exaggerated and unsupported allegations against [YUFA] and [York University]. For the Board to so waste its time and resources is an abuse of the public resources of this province, and plainly an abuse of process.
>
> (*Khaiter v. Association*, 2010 CanLII 62247 (ON LRB), 2010 CanLII 62247 (ON LRB), at paras. 11 and 12)

[26] The Ontario Labour Relations Board concluded:

> The Union and the employer should face bona fide, though perhaps mistaken applications before the Board. What they should not have to face is a course of conduct that is unremitting, intemperate, lacking in merit, and vexatious.

(*Khaiter v. Association*, 2010 CanLII 62247 (ON LRB), 2010 CanLII 62247 (ON LRB), at para. 14)

[27] This is the decision in which the Ontario Labour Relations Board declared Peter A. Khaiter a vexatious litigant.

[28] In a decision leading to the second of the four applications for judicial review (Court File No. 456/09), the Human Rights Tribunal of Ontario expressed the concern that, in response to having been granted an indulgence that allowed him to provide written submissions responding to the case law that had been provided, Peter A. Khaiter had failed to comply with its instructions:

> The applicant disregarded my express instructions and instead filed written submissions comprising 96 paragraphs reiterating his oral submissions at the hearing, only one of which made any reference to any case law submitted by the respondents. In addition, in paragraphs 44 to 63 the applicant raised events post-dating the original complaint, and which were not addressed by any party at the case resolution conference....

(Human Rights Tribunal of Ontario Case Resolution Conference Decision 2008 HRTO 241 (CanLII), 2008 HRTO 241, at para. 23)

[29] In a decision dealing with the separate human rights complaint to which I have already referred (see: para. [20], above), the Human Rights Tribunal of Ontario went beyond a description of the strategy revealed by Peter A. Khaiter. Under the heading, "Ulterior Motive", it continued:

> I would also include in this element of the analysis the tendency to name un-necessary respondents including other tribunal decision makers. The applicant has engaged in a pattern, in this and other proceedings, of seeking to add parties with no substantial connection to the issues in dispute, including other tribunal decision makers and agency heads.
>
> The applicant has also exhibited a pattern of making bald and general allegations without particulars that would connect those allegations to a violation of the statute or rule in question.
>
> Both in the Applications at the Tribunal and in the related OLRB proceedings, decision-makers have concluded that the matters before them ought to be dismissed for failure of the applicant to plead a *prima facie* case. In each case the applicant is found to have provided only vague and general allegations. The Complaint underlying this Application is also largely bereft of particulars; instead it consists of general, vague and

essentially bald allegations devoid of any facts that would connect those allegations to the *Code*.

I also note that the unparticularized allegations pre-date the filing of the Complaint by as many as six or seven years with the bulk of them occurring three to six years prior to the Complaint being filed. At this stage the respondents have not sought the dismissal of any part of the Application on the basis that it is untimely but that argument would certainly be available to them.

In my view, the applicant has also engaged in a pattern of abusive conduct by his use of routine unfounded allegations of bias and impropriety against tribunal decision makers and external counsel.

The applicant has crossed the line between vigorously defending his position and failure to take the Tribunal's direction. He has commenced trivial and vexatious interlocutory matters for no apparent purpose other than to vex and harass the respondents.

As well when afforded an extraordinary opportunity to particularize the bare bones paragraphs of the human rights complaint the applicant did not comply with my direction made at the hearing but instead submitted a 178 page document. It is not in compliance with my Direction at the hearing in that it is not an exposition of particulars related to each of the allegations made in the complaint and set out above – although scattered through it are alleged facts that appear to relate to some of the allegations made. Rather it is a detailed reply to the respondents' Response to this Application including lengthy passages of argument. It also includes entirely new allegations that were never part of the complaint.

The applicant's manifest failure to comply with the Direction at the hearing and his attempt again to expand the scope of the allegations in the complaint by the addition of entirely new and unrelated matters, despite the earlier Decisions and Directions, is a serious concern and I find was intended largely to vex and harass the respondents.

The applicant also repeatedly makes technical submissions that he knows or ought to know will be dismissed, having unsuccessfully advanced the same submission in prior proceedings. For example, the applicant made lengthy submissions respecting the authority of counsel for YUFA to sign the Request to Intervene form. This challenge was strikingly similar to an early challenge he made in the other Application before the Tribunal as well as in his OLRB proceedings.

It is also clear from a review of the file that as time goes by the applicant has articulated his human rights claims in increasingly extravagant terms.

In the human rights complaint form the applicant makes brief claims of what he believed were incidents of discrimination and harassment. At their highest the respondents' alleged mis-conduct is described as 'discrimination, harassment and humiliation'. As time has passed the characterizations of the respondents' behavior have become significantly more extreme.

In submissions filed by the applicant on March 8, 2010, the applicant described his experience at the hands of the respondents as 'continuous and malicious workplace hostility, harassment, torture, humiliation virtually on an every day basis'. On March 18, 2010 in a further submission provided by the applicant, he used the following language to describe the alleged behavior of the respondents:

> hostility, harassment, humiliation, torture, sadism, psychological terror;
>
> persistent continuation with the practices of discrimination and harassment and malicious aggravation of employment hostility to the level of sadism and psychological terror;
>
> by the respondents' malicious practices of workplace hostility, sadism, psychological terror, harassment, discrimination, humiliation and torture

The applicant's characterizations of his experience are inflammatory and disproportionate – the language stretches the meaning of the words used beyond any reasonable person's understanding of them. I find that the applicant has begun employing this inflammatory language solely for the purpose of vexing the respondents.

In this regard the respondents point out that the applicant has recently claimed new and extravagant remedies, in particular punitive damages in the amount of $50 million from the respondent university and $50,000.00 from each of the individual respondents. The applicant regularly cites Tribunal case law in his submissions. He knows that the remedies he is seeking are so far beyond what is possible as to be incredible. The applicant is a sophisticated and intelligent litigant and I infer that these extraordinary remedial requests are advanced solely for the purpose of vexing the respondents, particularly the individuals involved in this Application.

In the conduct of this proceeding the applicant brought interlocutory motions solely for the purpose of delay and putting the respondents to the expense of responding to them. For example, the applicant sought an adjournment of the hearing primarily on the basis of alleged concern about the Tribunal's authority to deal with this Request and alleged confusion about the precise issue to be determined. It cannot have been more clear what the issue for determination was, having been described in the Tribunal's communications with the parties, including a Case Assessment Direction, dated September 16, 2009, a Tribunal letter, dated October 15, 2009 and a further Case Assessment Direction, dated January 14, 2010. I find that the reasonable inference to be drawn from these facts is that the applicant's request was made for no other purpose than vexing the respondents by avoiding the hearing of the respondents' Request.

Similarly, the Request for Order seeking the dismissal of the respondents' Request on specious grounds and after the matter had been argued constituted in my view a vexatious act on the applicant's part, serving only to vex the respondents and put them to the further expense of responding to it.

> (*Peter Khaiter v. York University, Barry Miller and Rhonda Lenton, supra,* at paras. 43 to 50 and 52 to 58 referred to in *Khaiter v. Association*, *supra*, [2010] CanLII 62247 (ON LRB)], at para. 10)

[30] After all of this, the Human Rights Tribunal of Ontario concluded:

> In my view, it is a reasonable inference that this Application, whatever its initial merits, is now being maintained for a purpose unrelated to the merits of the Application.
>
> Based on his voluminous submissions and from what can be gleaned from the public record in the other proceedings, it is clear that the applicant is a sophisticated, educated and intelligent man. He communicates clearly and is able to cite Tribunal and other jurisprudence with facility. *He knows what he is doing.*
>
> [Emphasis added]
>
> (*Peter Khaiter v. York University, Barry Miller and Rhonda Lenton, supra,* at paras. 62 and 65)

[31] It is evident that Peter A. Khaiter has been misusing the processes these Boards offer for a purpose not related to resolving the disputes at hand. The delay in processing the four applications for judicial review is demonstrative of the same attitude and consistent with an effort to keep these disputes alive rather than bringing them to a conclusion.

Explanations for the Delay

[32] In his submissions to this Court, Peter A. Khaiter attempted to explain the delay. He does not accept that any of the delay is attributable to him. He says that York University and YUFA had a conscious strategy to take up his time by aggravating the difficulties he was having with the University in respect of his desire to become tenured. As he sees it, YUFA wanted to remove whatever obstruction there was to his termination. This motion to dismiss the four applications for judicial review was part of the program to deny him representation and "to get rid of me". There is no evidence to support any of this.

[33] Peter A. Khaiter says that with his responsibilities at York University: his teaching load, student interviews and involvement with examinations, he did not have time to set down the four applications for judicial review to be heard. It should go without saying that those who come to court have an obligation to complete the responsibilities they owe to the process. The other parties and the court cannot be left to wait until every other aspect of an individual's life has been taken care of.

[34] Peter A. Khaiter blamed some of his difficulties on the tribunals that dealt with his various cases. He does not accept their findings. He says that in response to the decision of the Ontario Labour Relations Board made on October 27, 2010 (see: *Khaiter v. Association, supra,*2010 CanLII 62247 (ON LRB), [2010 CanLII 62247] (ON LRB)), he requested a re-

consideration which, he submitted the Board ignored. It is true that Peter A. Khaiter wrote a letter to the Ontario Labour Relations Board referring to the section of the *Labour Relations Act* which allows for the re-consideration of a decision the Board has made and requesting that the Board revoke its decision. It may be that the Board never responded, but the letter does not stand as a request that the decision be re-considered. It was sent to the Interim Chair of the Ontario Labour Relations Board and was marked "Private and Confidential". It was not copied to the other parties and does not ask for a re-consideration so much as it demands a revocation. Having asked, it goes on:

> It would be advisable, just, fair and the most efficient way of resol[v]ing the issue rather than engaging proceedings of judicial review, a tort action under the Civil Law and a process under the *Criminal Code of Canada*, all of which I will be forced to utilize in order to defend my rights, reputation and honor, that has been maliciously infringed by your Decision and to make the infringer legally liable.

[35] Peter A. Khaiter also referred to personal concerns. He advised the court that his father became ill. He provided care and guided the treatment of his father. His father died December 7, 2011. It is difficult not to be sympathetic to such a situation. It is one that many of us confront. In these circumstances, there is no explanation as to what has happened since December 7, 2011 and why, over the course of the following year, this situation would impact on the ability of Peter A. Khaiter to set down the four applications to be heard.

[36] None of this provides a satisfactory explanation for the delay. To the contrary, these concerns tend to exacerbate the understanding that Peter A. Khaiter has been unprepared to accept the responsibility and obligations that come with bringing a matter to court.

Rule 1.04(1) of the Rules of Civil Procedure

[37] In the course of the submissions made by Peter A. Khaiter, there was reference to Rule 1.04(1) of the *Rules of Civil Procedure*. The Rule states:

> These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

[38] Along with the direction to be expeditious, the Rule includes a general preference that disputes be decided on their merits. In this case, the delay has created a situation where allowing these matters to proceed would be disruptive and prejudicial to others. To put it simply, by carrying these matters as he has, Peter A. Khaiter has delayed too long and lost or, by his actions, given up the right to have the four applications for judicial review heard on the merits.

Should this Motion have been heard by the Full Panel?

[39] A motion in the Divisional Court is to be heard by a single judge, unless otherwise provided by the rules of court (see: *Courts of Justice Act*, R.S.O. 1990 Chap. C. 43, s. 21(3)). There is no rule that would require this motion to have been heard by a panel. Nonetheless, in *15202437 Inc. (c.o.b. Pro Pipe Construction) v. Ontario Pipe Trades Council, supra*, the judge

noted that it was preferable that a motion to dismiss an application for judicial review for delay be left to be dealt with by the panel of Divisional Court which would hear the application. In making this observation, the judge specifically did not take issue with the decision made by a single judge in *Ransom v. Her Majesty the Queen, supra,* dismissing an application for judicial review on account of inordinate delay. The judge, in *1520437 Inc.*, offered the opinion that a single judge should only deal with such a motion where it was plain and obvious that the application should be dismissed for delay. The difficulty in this case was getting Peter A. Khaiter to agree on a date to come to court. The fundamental concern was his unwillingness to set down the four applications for judicial review to be heard. When confronted with the direction to choose between three dates for the hearing of this motion, he did not respond. The default date was selected. A week before the appointed day he advised that he was not available. When he appeared, he asked that it be adjourned. This request was the subject of separate reasons given orally at the hearing (see: 2013 ONSC 648). In the circumstances, it was fair and appropriate that this motion be dealt with by a single judge. Even if this were not so, considering the delay, in company with the purpose behind the actions taken by Peter A. Khaiter and his misuse of the proceedings that were the subject of the applications for judicial review, if necessary, I would find that it is plain and obvious that the four applications should be dismissed.

Conclusion

[40] For the reasons reviewed herein, the motion is granted. Each of the four applications for judicial review is dismissed.

[41] As was said at the outset, Peter A. Khaiter brought a cross-motion. While what is being sought is, in some ways, inconsistent and difficult to understand, the general thrust was to address issues that, if successful, would have left the four applications for judicial review in place. They range from the proposition that the counsel for YUFA was not properly authorized to bring the motions seeking to dismiss to an order that the rule requiring a respondent to a judicial review to deliver a record and factum within thirty days after being served with the applicant's material be complied with (see: Rule 68.04(4)). An e-mail was produced confirming that counsel was authorized. Facta have been filed in respect of each of the four applications for judicial review.

[42] The cross-motion does go beyond the immediate question of whether the four judicial reviews should be allowed to proceed. It sought an order setting aside or, in the alternative, staying the order of the Ontario Labour Relations Board declaring Peter A. Khaiter a vexatious litigant. Given the dismissal of the judicial reviews, there can be no basis for the court to act on any of these requests.

[43] Finally, an order was requested staying the applications for judicial review. At face value, this would be consistent with the efforts of Peter A. Khaiter to delay the hearing of these matters. During the course of submissions, it seemed that Peter A. Khaiter misunderstood what is meant by a stay. It seemed to be his view that a "stay" meant the applications would continue to proceed. I understood this to be akin to an application being left to stay in place. How this can be consistent with his request to "stay" the Order of the Ontario Labour Relations Board finding

him to be a vexatious litigant, an order he wanted dismissed, was not explained. This confirms the problems that occur when those who come to court, on their own behalf, make no effort to understand the process of the court and seek to contort it to their benefit as they perceive it.

Costs

[44] At the conclusion of the hearing of this motion, the parties made submissions as to costs. Neither counsel for the Ontario Labour Relations Board nor the Human Rights Tribunal of Ontario is asking for the costs of this motion. Counsel for YUFA seeks costs for each of the four applications for judicial review of $3,500 and an additional $3,500 as the costs of this motion.

[45] Peter A. Khaiter does not accept that any costs award should be made against him. He points out that, in *Ransom v. Her Majesty the Queen, supra,* a costs award of only $1,000 was made. Counsel for YUFA responds by saying that this is all that was asked for.

[46] In the circumstances, I expect there was some duplication in the conduct of each of the judicial reviews. I acknowledge the amount being requested is reasonable but, nonetheless, reduce the award made in recognition of the similarity in these proceedings. I award $3,500 for the first of the applications for judicial review, $2,500 for each of the remaining three applications for judicial review and $3,500 as costs of this motion. Accordingly, in total, I award $14,500 in costs, inclusive of fees, disbursements and HST, payable by Peter A. Khaiter to YUFA.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 2012

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2523-11-R: Iron Workers District Council of Ontario (Applicant) v. Pomerleau Inc. and Pomerleau Ontario Inc. (Respondent)

Unit: "all ironworkers and ironworkers' apprentices in the employ of Pomerleau Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman of all ironworkers and ironworkers' apprentices in the employ of Pomerleau Inc. in all sectors of the construction industry in United Counties of Stormont, Dundas and Glengarry excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

3278-11-R: United Food & Commercial Workers, Local 206 (Applicant) v. 2207162 Ontario Limited o/a Swiss Chalet Restaurant #1250 (Respondent)

Unit: "all employees of 2207162 Ontario Limited o/a Swiss Chalet Restaurant #1250, save and except Guest Services Managers and Assistant Guest Service Managers, and persons above the rank of Guest Services Managers and Assistant Guest Service Managers" (38 employees in unit)

1890-12-R: Allied Construction Employees Local 1030, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 1389506 Ontario Inc. o/a Areia Concrete (Respondent) v. Universal Workers Union, Labourers' International Union of North America, Local 183 (Intervener)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of 1389506 Ontario Inc. o/a Areia Concrete in the City of Hamilton, the City of Burlington, that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, and the Regional Municipality of Waterloo, in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, and save and except any person employed by 1389506 Ontario Inc. o/a Areia Concrete pursuant to a valid and subsisting collective agreement" (2 employees in unit)

2046-12-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Reliance Comfort Limited Partnership o/a Reliance Ideal Combustion and Reliance Holmes Heating (Respondent)

Unit: "all journeymen refrigeration and air conditioning mechanics, and apprentice refrigeration and air conditioning mechanics in the employ of Reliance Comfort Limited Partnership o/a Reliance Ideal Combustion and Reliance Holmes Heating in all sectors of the construction industry, excluding the industrial, commercial and institutional sector of the construction industry, in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2059-12-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Johnny B. Drywall Ltd. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Johnny B. Drywall Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all painters and painters' apprentices in the employ of Johnny B. Drywall Ltd. in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (0 employees in unit)

2164-12-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Abbey Road Construction Inc. (Respondent)

Unit: "all construction labourers in the employ of Abbey Road Construction Inc. in all sectors of the construction industry in the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2354-12-R: Labourers' International Union of North America Local 183 (Applicant) v. Multi Task Construction Inc. (Respondent)

Unit: "all construction labourers in the employ of Multi Task Construction Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all construction labourers in the employ of Multi Task Construction Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2527-12-R: The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Swan & Associates Inc. (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council (Intervener)

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of Swan & Associates Inc. in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit)

2559-12-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. World Scaffold Inc. and/or, Scaffold Canada Inc. (Respondent)

Unit: "all construction labourers in the employ of World Scaffold Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non working foremen and persons above the rank of non working foreman all construction labourers in the employ of World Scaffold Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman." (7 employees in unit)

2696-12-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. 2156840 Ontario Inc. o/a Richard Lopinski Electric (Respondent)

Unit: "all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of 2156840 Ontario Inc. o/a Richard Lopinski Electric in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of 2156840 Ontario Inc. o/a Richard Lopinski Electric in all sectors of the construction industry in the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2732-12-R: Canadian Construction Workers' Union (Applicant) v. 20/20 Management Limited (Respondent)

Unit: "all carpenters, carpenters¿ apprentices and construction labourers in the employ of 20/20 Management Limited in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (42 employees in unit)

2787-12-R: The International Union of Painters and Allied Trades, Local Union 114 (Applicant) v. C & C The Door and Window Centre Inc. (Respondent)

Unit: "all glaziers, glaziers¿ apprentices and metal mechanics in the employ of C & C The Door and Window Centre Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non working foremen and persons above the rank of non working foreman. all glaziers, glaziers¿ apprentices and metal mechanics in the employ of C & C The Door and Window Centre Inc. in all sectors of the construction industry in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (5 employees in unit)

Bargaining Agents Certified Subsequent to Vote

0754-12-R: Service Employees International Union Local 2 Brewery, General and Professional Workers' Union (Applicant) v. Impact Cleaning Services Ltd. (Respondent)

Unit: "all employees of Impact Cleaning Services Limited working in the City of Ottawa save and except supervisors, persons above the rank of supervisor, and all office, clerical and sales staff" (11 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	1

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

1535-12-R: The International Union of Painters and Allied Trades, Local Union 114 (Applicant) v. Abhe & Svoboda, Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Abhe & Svoboda, Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all painters and painters' apprentices in the employ of Abhe & Svoboda, Inc. in all sectors of the construction industry in the United Counties of Stormont, Dundas and Glengarry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (21 employees in unit)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

2072-12-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Reliance Comfort Limited Partnership o/a Reliance Ideal Combustion and Reliance Holmes Heating (Respondent)

Unit: "all journeyperson and apprentice refrigeration and air conditioning mechanics and maintenance mechanics employed by Reliance Comfort Limited Partnership o/a Reliance Ideal Combustion and Reliance Holmes Heating performing maintenance and/or service work in and out of the City of Ottawa save and except persons above the rank of working foreperson" (38 employees in unit)

Number of names of persons on revised voters' list	37
Number of persons who cast ballots	40
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	36
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	27
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	7

2307-12-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada

(CAW-Canada) (Applicant) v. Carleton University Academic Staff Association (Respondent)

Unit: "all employees of the Carleton University Academic Staff Association in the City of Ottawa" (4 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

2349-12-R: Ontario Nurses' Association (Applicant) v. Extendicare Rouge Valley (Respondent)

Unit: "all the Registered Nurses and Nurses with a temporary certificate of registration employed in a nursing capacity at Extendicare Rouge Valley, 551 Conlins Road, Toronto, Ontario, save and except the Assistant Director of Care and persons above the rank of Assistant Director of Care" (14 employees in unit)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2353-12-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada) (Applicant) v. Omni Facility Services of Canada Limited (Respondent) v. Labourers International Union of North America Local 183 (Intervener)

Unit: "all employees of Omni Facility Services Canada Limited engaged in cleaning services at Durham College (DC), Whitby and Oshawa Campuses and the University of Ontario Institute of Technology (UOIT) in the Regional Municipality of Durham, save and except supervisors, those above the rank of supervisor and all for whom another union held bargaining rights prior to the date of the application" (71 employees in unit)

Number of names of persons on revised voters' list	77
Number of persons who cast ballots	57
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	57
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	55

Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

2422-12-R: Service Employees International Union Local 2 Brewery, General and Professional Worker's Union (Applicant) v. ServiceMaster Clean of Niagara, a Division of Helping Limited (Respondent)

Unit: "all employees of ServiceMaster Clean of Niagara, a Division of Helping Limited in the Niagara Region save and except office and clerical employees, sales persons, supervisors and persons above the rank of supervisor" (86 employees in unit)

Number of names of persons on revised voters' list	89
Number of persons who cast ballots	63
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	60
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	48
Number of ballots marked against applicant	12
Number of ballots segregated and not counted	3

2456-12-R: Healthcare, Office and Professional Employees Union, Local 2220, UBCJA (Applicant) v. CSH Wynfield Retirement Residence Inc. and/or The Chartwell Wynfield Retirement Residence (Respondent)

Unit: "all employees of CSH Wynfield Retirement Residence Inc cob Wynfield Retirement Residence in the City of Oshawa save and except supervisors, persons above the rank of supervisor, office, clerical and maintenance staff" (42 employees in unit)

Number of names of persons on revised voters' list	38
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	27
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	26
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

2470-12-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Vision '74 Inc. (Respondent) v. Southwestern Ontario Health Care and Service Workers, Local 303, affiliated with Christian Labour Association of Canada (Intervener)

Unit: "all employees of Vision Rest Home in the City of Sarnia, save and except Registered Nurses, Supervisors, persons above the rank of Supervisor, office staff" (11 employees in unit)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	0

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked in favour of intervener	1
Number of ballots segregated and not counted	0

2478-12-R: Construction Workers Local 53 affiliated with the Christian Labour Association of Canada (Applicant) v. D. Grant Construction Limited (Respondent)

Unit: "all journeymen carpenters and apprentice carpenters and construction labourers in the employ of D. Grant Construction Limited in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, Elgin and Simcoe, the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township) and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non working foreman." (9 employees in unit)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

2497-12-R: Canadian Airport Workers Union (Applicant) v. Goodwill Industries of Toronto (Respondent) v. Teamsters Local Union 847 (Intervener)

Unit: "all employees of Goodwill Industries of Toronto including REACH employees save and except Assistant Store Managers and those above the rank of Assistant Store Manager, team leads and those above the rank of team leads, office, clerical, security and professional staff, supported employees on the rolls of the Ministry of Community and Social Services, persons employed in the Creative Services Division and students employed during the school vacation period" (502 employees in unit)

Number of names of persons on revised voters' list	498
Number of persons who cast ballots	309
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	308
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	195
Number of ballots marked in favour of intervener	110
Number of ballots segregated and not counted	1

2501-12-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Ontario Lottery and Gaming Corporation c.o.b. The Slots at Sudbury Downs (Respondent)

Unit: "all security officers of the Ontario Lottery and Gaming Corporation c.o.b. The Slots at Sudbury Downs in the City of Greater Sudbury save and except Supervisors, persons above the rank of Supervisor, officer, clerical, technical and surveillance staff" (27 employees in unit)

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	25
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	25
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	0

2504-12-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Toromont CAT (Respondent)

Unit: "all employees of Toromont CAT at or out of the City of Thunder Bay save and except Supervisors, persons above the rank of Supervisor, office, clerical and sales staff" (60 employees in unit)

Number of names of persons on revised voters' list	56
Number of persons who cast ballots	38
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	38
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	37
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

2520-12-R: Ontario Workers' Union (Applicant) v. SageCare Inc. c.o.b. as 147 Elder Street Inc. (Respondent)

Unit: "all employees of SageCare Inc. c.o.b. as 147 Elder Street Inc. at its Long Term Care Residence at 147 Elder Street in the City of Toronto, save and except Supervisors/Managers, persons above the rank of Supervisor/Manager, Professional Medical Staff, Registered and Graduate Nurses, Occupational Therapists, Physiotherapists, office and clerical staff" (28 employees in unit)

Number of names of persons on revised voters' list	31
Number of persons who cast ballots	30
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	29
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	10
Number of ballots segregated and not counted	1

2539-12-R: Labourers' International Union of North America, Local 183 (Applicant) v. J.E. Strong Limited o/a ServiceMaster Contract Services Mississauga (Respondent)

Unit: "all employees of J.E. Strong Limited o/a ServiceMaster Contract o/a ServiceMaster Contract Services Mississauga working at 1620 Tech Drive, 1935 Drew Road Unit #28, 3185 America Drive, 55 West Drive, 1 World Drive, 410 Admiral Road, 7150 Derrycrest Drive, 30 Driver Road, 1790 Matheson Blvd., 1820 Matheson Blvd., 635 Secretariat Court, 5855 Terry Fox Way, 5180 Orbitor Drive, 6209 Northwest Drive, 415 Annagem Blvd., 445 Export Blvd., 6155 Freemont Blvd., 7420 Pacific Circle, in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (40 employees in unit)

Number of names of persons on revised voters' list	43
Number of persons who cast ballots	44
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	37
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	6
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	26
Number of ballots marked against applicant	13
Number of ballots segregated and not counted	5

2541-12-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 1179299 Ont. Ltd. c.o.b. as The Barrington Retirement Home (Respondent)

Unit #1: "all employees of 1179299 Ontario Ltd. c.o.b. The Barrington Retirement Home in the City of Barrie, save and except supervisors, persons above the rank of supervisor, office and clerical staff (including the positions of concierge and receptionist), marketing and sales representatives." (20 employees in unit)

Unit #2: "All employees of 1179299 Ont. Ltd., c.o.b. as The Barrington Retirement Home in the City of Barrie, Ontario save and except supervisors and persons above the rank of supervisor, office, clerical staff, marketing representatives and sales representatives." (20 employees in unit)

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	3

2558-12-R: Canadian Union of Public Employees (Applicant) v. Horizons For Youth (Respondent)

Unit: "all employees of Horizons For Youth in the City of Toronto save and except Executive Director, Operations Manager, Shift Supervisor, Development Associate, Accountant, persons above the rank of Shift Supervisor, and employees in bargaining units for whom any trade union held bargaining rights as of November 23, 2012." (30 employees in unit)

Number of names of persons on revised voters' list	30

Number of persons who cast ballots	24
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	24
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	0

2653-12-R: Canadian Union of Public Employees (Applicant) v. Kids and Company Ltd. (Respondent)

Unit: "all employees of Kids and Company Ltd. in the Town of Oakville save and except Director and persons above the rank of Director" (13 employees in unit)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2654-12-R: Grand River Valley Health Care Employee's Union Local 305 affiliated with the Christian Labour Association of Canada (Applicant) v. Haldimand War Memorial Hospital (Respondent)

Unit: "all employees of Haldimand War Memorial Hospital in Haldimand County, Ontario save and except professional medical staff, Registered Nurses, Nurse Practitioners, office staff, paramedical staff, clerical staff employed in a confidential capacity in matters relating to labour relations, students employed in summer employment programs, work experience, co-op or other program, supervisors and persons above the rank of supervisor. "Paramedical Staff" include employees working in the following classifications: Laboratory Technologist, Laboratory Technicians, X-ray and Diagnostics Imaging Technicians, Health Record Technicians, Graduate and Undergraduate Dieticians, Physiotherapists, Occupational Therapists, Pharmacy Technician, Pharmacy Technologists, Pharmacy Assistants, Graduate and Undergraduate Pharmacists, Clinical Record Technicians and Phlebotomists" (89 employees in unit)

Number of names of persons on revised voters' list	74
Number of persons who cast ballots	58
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	49
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	9
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	35
Number of ballots marked against applicant	14
Number of ballots segregated and not counted	9

2666-12-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Compass Canada Support Services Ltd. o/a Eurest Services (Respondent)

Unit: "all employees of Compass Canada Support Services Ltd. o/a Eurest Services at or out of 1415 Bonhill Road in the City of Mississauga, engaged in cleaning and maintenance, save and except supervisors, persons above the rank of supervisor, office, housekeeping and clerical staff" (9 employees in unit)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

2683-12-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Royal Host Limited Partnership c.o.b. as Super 8 Sudbury (Respondent)

Unit: "all employees of Royal Host Limited Partnership employed at the Super 8 Sudbury at 1956 Regent Street South in the City of Sudbury engaged in work as Front Desk Clerks, save and except Supervisors, persons above the rank of Supervisors, Office Staff and Night Auditors" (5 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2688-12-R: Syndicat Canadien de la Fonction Publique (Applicant) v. L'Hôpital Montfort (Respondent)

Unit: "[original in french] all Registered MRI Technologists and all MRI Charge Technologists employed by Montfort Hospital, in the City of Ottawa, Ontario, with the exception of supervisors, individuals above the rank of supervisor, and employees who are already represented by a union tous les technologues autorisés IRM et tous les technologues responsables IRM employé par l'Hôpital Montfort dans la Ville d'Ottawa, Ontario à l'exception des superviseurs et des personnes au-dessus du rang de superviseurs et les employés déjà représentés par un syndicat" (17 employees in unit)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0

Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

Applications for Certification Dismissed Without Vote

3662-06-R: Construction Workers Union Local 150 affiliated with the Christian Labour Association of Canada (Applicant) v. Peninsula Maintenance Limited (Respondent) v. International Brotherhood of Electrical Workers, Local 303 and the IBEW Construction Council of Ontario (Intervener)

0540-11-R: The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. BM Metals Services Inc. (Respondent)

0039-12-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of The United States and Canada, Local 787 (Applicant) v. Downsview Heating and Air Conditioning Ltd. (Respondent)

2695-12-R: Canadian Union of Public Employees (Applicant) v. Township of North Dundas (Respondent)

Applications for Certification Dismissed Subsequent to Vote

2940-00-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Shiu Pong Group Limited and/or, Shiu Pong Corporation and/or, Shiu Pong Developments Limited and/or, Shiu Pong Enterprises (Canada) Limited and/or, Shiu Pong Management Limited and/or, Shiu Pong Construction Ltd. (Respondent)

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of Shiu Pong Group Limited and/or Shiu Pong Corporation and/or Shiu Pong Developments Limited and/or Shiu Pong Enterprises (Canada) Limited and/or Shiu Pong Management Limited and/or Shiu Pong Construction Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (1 employees in unit)

Number of names of persons on revised voters' list	1
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names do not appear on voters' list	1

0971-03-R: Central Ontario Regional Council of Carpenters, Drywall and Allied Workers United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ermacon Contracting Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Ermacon Contracting Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of Ermacon Contracting Inc. in all other sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Number of names of persons on revised voters' list	0
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	5

2308-09-R: Labourers' International Union of North America, Local 625 (Applicant) v. Bricetin Concrete Restoration Inc. (Respondent)

Unit: "all construction labourers in the employ of Bricetin Concrete Restoration Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of Bricetin Concrete Restoration Inc. in all other sectors of the construction industry in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

3777-09-R: Christian Labour Association of Canada (Applicant) v. Liberty Assisted Living Inc. c.o.b. The Royalton Retirement Residence Kingston (Respondent)

Unit: "all employees of Liberty Assisted Living Inc. c.o.b. The Royalton Retirement Residence in the City of Kingston save and except supervisors, those above the rank of supervisors, and office staff." (39 employees in unit)

Number of names of persons on revised voters' list	44
Number of persons who cast ballots	37
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	36
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	20
Number of ballots segregated and not counted	1

1512-11-R: Communications, Energy and Paperworkers Union of Canada, Local 87-M Southern Ontario Newsmedia Guild (Applicant) v. Metroland Media Group Ltd. (Respondent)

Unit: "all employees of Metroland Media Group Ltd. in its South Muskoka operation in its Media Group North Division save and except production employees and persons excluded pursuant to Section 1(3)(b) of the Act. (Clarity Note: The bargaining unit encompasses editorial, sales and administrative/clerical employees.)" (21 employees in unit)

Number of names of persons on revised voters' list	51
Number of persons who cast ballots	31
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names appear on voter's list	15
Number of segregated ballots cast by persons whose names do not appear on voters' list	5

1739-12-R: Labourers' International Union of North America, Local 625 (Applicant) v. Mark G Contracting Inc. (Respondent)

2499-12-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. The Leamington United Mennonite Home and Apartments (Respondent)

Unit: "all employees of Leamington United Mennonite Home and Apartments save and except supervisors, persons above the rank of supervisors, registered nurses, hairdresser, office and clerical staff, and those employees covered by a subsisting agreement." (16 employees in unit)

2507-12-R: International Association of Machinists and Aerospace Workers (Applicant) v. FAG Aerospace Inc. (Respondent)

Unit: "All employees of FAG Aerospace Inc. in the City of Stratford, save and except supervisors, persons above the rank of supervisor, office and engineering staff." (355 employees in unit)

Number of names of persons on revised voters' list	371
Number of persons who cast ballots	352
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	351
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	105
Number of ballots marked against applicant	243
Number of ballots segregated and not counted	1

2512-12-R: International Union of Operating Engineers, Local 772 (Applicant) v. Regal Lifestyle Communities c.o.b. Windsor Park Manor (Respondent)

Unit: "all employees of Windsor Park Manor, 990 Hunt Club Road, Ottawa, Ontario, save and except supervisors, persons above the rank of supervisors, concierge, office and clerical staff" (49 employees in unit)

Number of names of persons on revised voters' list	50
Number of persons who cast ballots	29
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	25
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0

Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	14
Number of ballots segregated and not counted	1

2603-12-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. Sleegers Engineered Products Inc. (Respondent)

Unit: "all employees of the Responding Party employed in the City of London, ON, save and except Shop Supervisors and those above the rank of Shop Supervisor, Engineers, Quality Control Inspectors, Technicians, facilities, office, clerical, sales and customer service employees" (61 employees in unit)

Number of names of persons on revised voters' list	63
Number of persons who cast ballots	61
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	61
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	40
Number of ballots segregated and not counted	0

2726-12-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Steelcraft Inc. (Respondent)

Unit: "all employees of Clemmer Steelcraft Technologies Inc. and/or Steelcraft Inc in the City of Cambridge save and except supervisors and those above the rank of supervisor, office, clerical, and technical staff." (135 employees in unit)

Number of names of persons on revised voters' list	150
Number of persons who cast ballots	141
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	137
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	51
Number of ballots marked against applicant	86
Number of ballots segregated and not counted	4

Applications for Certification Withdrawn

1928-03-R: Labourers' International Union of North America, Local 506 (Applicant) v. 1046627 Ontario Limited o/a Coram Construction Group (Respondent)

0308-04-R: Central Ontario Regional Council of Carpenters, Drywall and Allied Workers United Brotherhood of Carpenters and Joiners of America (Applicant) v. Penegal Trim & Supply Ltd. (Respondent)

0309-04-R: Central Ontario Regional Council of Carpenters, Drywall and Allied Workers United Brotherhood of Carpenters and Joiners of America (Applicant) v. Forest Interior Trim Ltd. (Respondent)

0418-07-R: United Brotherhood of Carpenters and Joiners of America, Local 494 (Applicant) v. Paramount Homes Inc./Capaldi Corporation (Respondent) v. Labourers' International Union of North America, Local 625 (Intervener)

3599-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Lomax Management Inc., 829211 Ontario Limited, and, Jeffko Construction Limited (Respondent) v. Canadian Construction Workers' Union (Intervener)

0658-11-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. I.C.I. Construction Ltd., I.C.I. Construction Corporation (Respondent)

3169-11-R: International Union of Operating Engineers, Local 793 (Applicant) v. Mantor Landscape Limited (Respondent)

0469-12-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Huspen Contracting Ltd. (Respondent)

0893-12-R: Labourers' International Union of North America, Local 837 (Applicant) v. Denbok Landscaping & Design Ltd. (Respondent)

1496-12-R: Canadian Construction Workers' Union (Applicant) v. BDC Bull Dozer Construction Ltd. (Respondent)

2720-12-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 853 - Sprinkler Fitters of Ontario (Applicant) v. Kerrie-Lee Harmoch and/or Dave Rooke o/a Fluid Fire Protection (Respondent)

2729-12-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Badgeley Island Aggregates Inc. (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0382-07-R: Greater Ontario Regional Council of Carpenters and Allied Trades United Brotherhood of Carpenters, Local 494 (Applicant) v. Titan Contracting (Windsor) Inc., Paramount Homes Inc., Portofino Corporation (Respondent) v. Labourers' International Union of North America, Local 625 (Intervener) (Withdrawn)

SALE OF A BUSINESS

3918-03-R: Labourers' International Union of North America, Local 506 (Applicant) v. Adam Holdings Limited, 1046627 Ontario Limited c.o.b. as Coram Construction Group and, The Ram-Land Corporation Limited (Respondent) (Withdrawn)

2954-05-R: Labourers' International Union of North America and Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Hydro One Inc. (including: Hydro One Networks Inc., Hydro One Networks Services Inc., Hydro One Remote Communities Inc.) and, De Beers Canada Inc. (Respondent) (Withdrawn)

1731-06-R: Labourers' International Union of North America, Local 527 (Applicant) v. Bert Nibourg Construction, Nibourg Waste Management Inc., 792138 Ontario Inc. o/a Nibourg Developments & Construction (Respondent) (Withdrawn)

0122-07-R: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Ross & Anglin Ltd., Ross & Anglin Ontario Ltd. (Respondent) (Dismissed)

2375-08-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Interpaving Limited, 1498240 Ontario Limited, 1700350 Ontario Limited, The Walford (Timmins) Retirement Home Limited Partnership, 1499413 Ontario Inc., The Walford (Thunder Bay) Retirement Home Limited Partnership, 1138036 Ontario Limited o/a "The Walford", 1582611 Ontario Inc., Copper Cliff Manor Limited Partnership (Respondent) (Withdrawn)

3198-09-R: Le Conseil scolaire catholique de district des Grandes Rivières (CSCD Grandes Rivières) (Applicant) v. Le Conseil des écoles séparées catholiques de Moosonee (CESC Moosonee), La Fédération des enseignantes et enseignants des écoles secondaires de l'Ontario (FEESO), Le syndicat canadien de la fonction publique, local 7777 (SCFP), Le Syndicat des employés de la fonction publique de l'Ontario (Respondent) (Endorsed Settlement)

0628-11-R: Labourers' International Union of North America, Local 506 (Applicant) v. Aluma Systems Inc., Ulma Construction Systems Canada Inc., 17799125 Ontario Ltd., Verdi Alliance Civil Holding Ltd., Verdi Inc., Alliance Forming Ltd. and, Alliance Floor Finishing Ltd. (Respondent) (Withdrawn)

2390-11-R: The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Phil Fletcher Contracting Ltd., Irish Creek Enterprises Inc., Andrews Backhoe Services Inc. and, Collaborative Structures Limited (Respondent) (Dismissed)

2623-11-R: The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America on its own helalf and on behalf of Drywall Acoustic Lathing and Insulation, Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Mario Genua and Lino Genua c.o.b. as Gen's Drywall Lathing & Acoustics, Gen's Drywall Lathing & Acoustics
Inc., Victory Drywall & Acoustics Inc. (Respondent) (Withdrawn)

2848-11-R: Iron Workers District Council of Ontario (Applicant) v. Pomerleau Inc., Pomerleau Ontario Inc. (Respondent) (Granted)

0256-12-R: International Union of Painters and Allied Trades Local 1891 (Applicant) v. Alliance Environmental & Abatement Contractors Inc. and, Caliber Environmental Construction Services Inc. (Respondent) (Terminated)

2100-12-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) - Local 2020 (Applicant) v. Badgeley Island Aggregates Inc., Unimin Canada Ltd. (Respondent) (Withdrawn)

2730-12-R: International Union of Painters and Allied Trades Local 1891 (Applicant) v. Lorcon 2000 Contracting Inc and, Lorcon Drywall Ltd. (Respondent) (Granted)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

1781-12-R: Sheet Metal Workers' International Association Local Union 540 (Applicant) v. CCL Container, Independent Canadian Extrusion Workers' Union (Respondent) (Granted)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3517-03-R: Robert Edwards (Applicant) v. Labourers' International Union of North America, Local 527 (Respondent) v. K.S. Edwards Construction (Intervener) (Dismissed)

Unit: "all construction labourers in the employ of K.S. Edwards Construction in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario." (1 employees in unit)

Number of names of persons on revised voters' list	1
Number of persons who cast ballots	1
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	1
Number of ballots segregated and not counted	0

3652-06-R: Darryl DeVilliers Schut (Applicant) v. International Brotherhood of Electrical Workers Locals 105, 115, 120, 303, 353, 402, 530, 586, 773, 804, 1687, 1739 and the International Brotherhood of Electrical Workers Construction Council of Ontario (Respondent) v. Peninsula Maintenance Ltd. (Intervener) (Dismissed)

Unit #1: "All electricians and electricians' apprentices in the employ of Peninsula Maintenance Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0

0276-10-R: Brad D. Hodgins (Applicant) v. The International Union of Painters and Allied Trades and the Ontario Council of the International Union of Painters and Allied Trades (Respondent) v. 1440842 Ontario Inc. o/a KYIV Architectural Metals (Intervener) (Terminated)

Unit: "the Architectural Glass and Metal Contractors Association recognizes the International Union of Painters and Allied Trades and the Ontario Council of the International Union of Painters and Allied Trades as the exclusive bargaining agent for employees of employers engaged in the Industrial, Commercial and Institutional sector of the Construction Industry, for whom the Union has bargaining rights. Employee is defined as a journeyperson glazier metal mechanic, working supervisor, lead hand or apprentice working for any individual firm, co-partnership or corporation." (7 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	2

2833-11-R: Ontario Workers' Union (Applicant) v. Service Employees International Union, Local 1 Canada (Respondent) v. SteriPro Canada Limited Partnership (Intervener) (Dismissed)

2834-11-R: Ontario Workers' Union (Applicant) v. Service Employees International Union, Local 1 Canada (Respondent) v. SteriPro Canada Limited Partnership (Intervener) (Dismissed)

2402-12-R: Priyadev De Mel, Sabrina Inch, Milroy Inch and Yolanda Byrde (Applicant) v. United Food and Commercial Workers International Union (UFCW Canada) (Respondent) v. Canadian Mini-Warehouse Properties (Intervener) (Dismissed)

Unit: "all Property Managers, Assistant Property Managers, Relief Property Managers and Maintenance Managers employed by Canadian Mini-Warehouse Properties Company in the City of Brampton, City of Oakville, City of Toronto and City of Mississauga save and except District Managers, persons above the rank of District Manager, Regional Managers, and office and administration staff" (60 employees in unit)

Number of names of persons on revised voters' list	62
Number of persons who cast ballots	57
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	57
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	29
Number of ballots marked against respondent	28
Number of ballots segregated and not counted	0

2458-12-R: Ostrander's Funeral Home Ltd. (Applicant) v. United Food and Commercial Workers Canada, Local 175 (Respondent) (Granted)

Unit: "all employees of Ostrander's Funeral Home Ltd. in the Town of Tillsonburg, Ontario." (3 employees in unit)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3
Number of ballots segregated and not counted	0

2714-12-R: Ian Allen and Dan Freed (Applicant) v. DeHavilland Security Police Officers Association (Respondent) v. Bombardier Aerospace (Intervener) (Granted)

2829-12-R: Simon Danielewicz (Applicant) v. Labourers' International Union of North America, Local 1081 (Respondent) v. Gedco Excavating Ltd. (Intervener) (Dismissed)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3250-03-U: Labourers' International Union of North America, Local 506 (Applicant) v. 1046627 Ontario Limited o/a Coram Construction Group (Respondent) (Withdrawn)

2464-06-U: Labourers International Union of North America, Local 837 (Applicant) v. McMaster University (Respondent) (Withdrawn)

2519-06-U: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. AXA Electric Inc. (Respondent) (Withdrawn)

3361-06-U: Stefan Pobojewski (Applicant) v. CAW - TCA Brampton Local 1285 Canadian Auto Workers (Respondent) v. DaimlerChrysler Commercial Buses North America Ltd. (Intervener) (Withdrawn)

3599-06-U: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Tesla Electric (Windsor) Inc. and George Dobrich (Respondent) (Withdrawn)

3704-06-U: International Brotherhood of Electrical Workers, Local 303 (Applicant) v. Peninsula Maintenance Limited (Respondent) v. Construction Workers Local 150 affiliated with Christian Labour Association of Canada (Intervener) (Dismissed)

0818-07-U: International Association of Machinists and Aerospace Workers, Lodge Lodge 412 (Applicant) v. Cornwall Industrial Mechanical (Respondent) (Withdrawn)

0943-07-U: Public Service Alliance of Canada (Applicant) v. Canadian Corps of Commissionaires (Ottawa Division) (Respondent) (Withdrawn)

1588-07-U: International Union of Painters and Allied Trades, Local 1891 (Applicant) v. Western Ontario Drywall Limited (Respondent) (Withdrawn)

2600-07-U: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Vicor Mechanical Ltd. (Respondent) (Withdrawn)

3866-07-U: Masonry Industry Employers Council of Ontario and Ottawa Region Masonry Contractors Association (Applicant) v. The International Union of Bricklayers and Allied Craftsmen, Local 7, Arthur Coelho & Sons Masonry, Ottawa Masonry, 6468721 Canada, Inc. (c.o.b. as CDO Masonry), M.A.C. Maconnerie Masonry (Respondent) (Terminated)

1670-08-U: UNITE HERE (Applicant) v. Café on the Square and/or 1150893 Ontario Limited and/or 1150893 Ontario Limited o/a Café on the Square and/or Pinnacle Catering and/or Pinnacle Catering o/a Café on the Square (Respondent) (Withdrawn)

1504-09-U: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Promark-Telecon Inc., Telecon Canada Ltd. (Respondent) (Withdrawn)

2142-09-U: Labourers' International Union of North America, Ontario Provincial District Council, on its own behalf and on behalf of all other affiliated bargaining agents (Applicant) v. White Contracting Ltd. (Respondent) (Withdrawn)

2212-09-U: Ali Ghalem (Applicant) v. United Steelworkers (Respondent) (Withdrawn)

2947-09-U: Labourers' International Union of North America, Local 625 (Applicant) v. Bricetin Concrete Restoration Inc. and, Mark Rivait (Respondent) (Dismissed)
2959-09-U: Toronto Civic Employees Union, Local 416 CUPE (Applicant) v. York Community Services Centre (Respondent) (Withdrawn)

3779-09-U: Christian Labour Association of Canada (Applicant) v. Liberty Assisted Living Inc. c.o.b. The Royalton Retirement Residence Kingston (Respondent) (Dismissed)

0790-10-U: Labourers' International Union of North America, Local 506 (Applicant) v. Asco Construction Ltd. (Respondent) v. Michael Newson and Giuseppe Gallizzi on behalf of themselves and the Employees of Asco Construction Ltd. (Intervener) (Dismissed)

0875-10-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Tandem Networks Inc. (Respondent) (Withdrawn)

1269-10-U: International Brotherhood of Electrical Workers, Local Union 1687 (Applicant) v. I.C.E. Contracting Inc. (Respondent) (Withdrawn)

1722-10-U: Ontario Taxi Workers' Union (Applicant) v. Hamilton Cab Co. o/a Hamilton Cab (Respondent) (Withdrawn)

2045-10-U: Elementary Teachers' Federation of Ontario (Applicant) v. York Region District School Board (Respondent) v. Canadian Union of Public Employees (Intervener) (Terminated)

2057-10-U: The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bamco Custom Woodworking Inc. (Respondent) (Withdrawn)

2265-10-U: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Dival Developments Ltd. and/or, E-Zee Forming Ltd. and/or, Tri-Star Forming Ltd. (Respondent) (Withdrawn)

2303-10-U: A Council of Trade Unions Consisting of Labourers' International Union of North America, Local 527 and, International Union of Operating Engineers, Local 793 (Applicant) v. A Group of Associated Companies Controlled by William Karson, consisting of: Karson Asphalt Paving Inc., West Carleton Sand & Gravel Inc., Karson Kartage & Konstruction (1994) Limited (Respondent) v. Karson Kartage & Konstruction Employees' Association (Intervener) (Granted)

2308-10-U: Communications Energy & Paperworkers, Local 87-M (Southern Ontario Newspaper Guild) (Applicant) v. Metroland Media Group Ltd. (Respondent) (Withdrawn)

2969-10-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Sacco Construction Limited (Respondent) (Withdrawn)

3213-10-U: Sacco Construction Limited (Applicant) v. Labourers' International Union of North America, Ontario Provincial District Council (Respondent) (Withdrawn)

1181-11-U: Labourers International Union of North America, Ontario Provincial District Council (Applicant) v. I.C.I. Construction Ltd.,, I.C.I. Construction Corporation (Respondent)
(Withdrawn)

1228-11-U: Labourers International Union of North America, Ontario Provincial District Council (Applicant) v. I.C.I. Construction Ltd.,, I.C.I. Construction Corporation, Matrix Metal Co. Ltd. Matrix Metal Ltd. (Respondent) (Withdrawn)

1713-11-U: David Berard (Applicant) v. International Union of Operating Engineers, Local 772-A (Respondent) (Withdrawn)
2051-11-U: Else M. Dale (Applicant) v. Ontario Nurses' Association (ONA) (Respondent) v. Alexandra Marine and General Hospital (Intervener) (Dismissed)

2309-11-U: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union 647 (Applicant) v. Canada Bread Company, Limited, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union AFL-CIO, CLC, Local 264 (Respondent) (Withdrawn)

2348-11-U: Durval Terceira, Daniel Avero, Jaime Melo, Geatano Strazzanti and Michael O'Brien (Applicant) v. Service Employees International Union Local 2, Brewery, General and Professional Workers' Union (Respondent) v. Universal Workers Union Labourers' International Union of North America Local 183 (Intervener) (Dismissed)

3073-11-U: Masonry Industry Employers' Council of Ontario (Applicant) v. Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers, Local 7 (Respondent) v. The Brick and Allied Craft Union of Canada and, the Ontario Provincial Conference of the International Union of Bricklayers and Craftworkers (Intervener) (Withdrawn)

3665-11-U: Martin Majhi (Applicant) v. UNITE HERE Local 75 (Respondent) (Dismissed)

0134-12-U: Ontario Secondary School Teachers' Federation (Applicant) v. Crown in Right of Ontario, the Honourable Mr. Dalton McGuinty, Premier of Ontario, the Honourable Ms. Laurel Broten, Minister of Education, the Honourable Mr. Dwight Duncan, Minister of Finance, Dalton McGuinty in his personal capacity, Laurel Broten in her personal capacity and, Dwight Duncan in his personal capacity (Respondent) v. Elementary Teachers' Federation of Ontario and, Ontario Public School Boards' Association, Ontario Catholic School Trustees' Association, CUPE (Intervener) (Dismissed)

0260-12-U: Charles Whitney Colhoun (Applicant) v. Power Workers' Union (Respondent) (Dismissed)

0264-12-U: Christine Lockett (Applicant) v. Labourers' International Union of North America, Ontario Federation of Health Care Workers and Labourers' International Union of North America, Local 1110 (Respondent) (Dismissed)

0282-12-U: Service Employees International Union Local 2, Brewery, General & Professional Workers' Union (Applicant) v. Evripos Janitorial Services Ltd. (Respondent) (Withdrawn)

0316-12-U: Glen McNeil (Applicant) v. The Ottawa Professional Fire Fighters Association, Local 162 I.A.F.F. (Respondent) (Dismissed)

0592-12-U: Robert Niven (Applicant) v. Canadian Auto Workers, Local 199 (Respondent) v. General Motors of Canada Limited (Intervener) (Dismissed)

1213-12-U: Beryl Nicholson (Applicant) v. Amalgamated Transit Union Local 1587 (Respondent) v. Metrolink (Intervener) (Withdrawn)

1367-12-U: Amanda Kristiansen (Applicant) v. UFCW Local 175, Wendy Absolom and, Katz Group, Rexall Drug Store No. 6977 (Respondent) (Dismissed)

1413-12-U: Tara Marenchin on her own behalf and on behalf of a group of members of LIUNA Local 1110 (Applicant) v. Labourers' International Union of North America, Ontario Federation of Health Care Workers, Labourers International Union of North America ("LIUNA"), Local 1110 (Respondent) (Dismissed)

1501-12-U: Dean Potvin & Justin Potvin (Applicant) v. Weston Bakeries Limited (Respondent) v. Milk and Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local Union #647 (Intervener) (Dismissed)

1632-12-U: The Residential Low Rise Forming Contractors Association of Metropolitan Toronto and Vicinity (Applicant) v. Universal Workers Union, Labourers' International Union of North America, Local

183, Jack Oliveira,, Chris McNeill,, Benefit Plan Administrators Ltd. and the, Trustees of Local 183 Members Benefit Fund (Respondent) (Withdrawn)

1704-12-U: Ashok Kumar (Applicant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union 647, Unilever Canada Inc. (Respondent) (Dismissed)

1729-12-U: Asja Vucica (Applicant) v. United Steelworkers (Respondent) v. ARAMARK Canada Ltd. (Intervener) (Withdrawn)

1917-12-U: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Cynergy Mechanical Ltd. (Respondent) (Withdrawn)

1994-12-U: Fatemeh Akdari (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Servce Workers International Union (United Steelworkers) Local 8300 (Respondent) (Dismissed)

2047-12-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Superior Waste Recovery Inc. and Superior Demolition Services Inc. (Respondent) (Withdrawn)

2048-12-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Wayne and Harold Smith Construction Limited (Respondent) (Withdrawn)

2080-12-U: International Union of Elevator Constructors, Local 96 (Applicant) v. Schindler Elevator Corp. (Respondent) (Withdrawn)

2118-12-U: Public Service Alliance of Canada (Applicant) v. Defense Contract Management Agency (Respondent) (Granted)

2199-12-U: Marian Birosz (Applicant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647 (Respondent) v. Canada Bread Company Limited (Intervener) (Withdrawn)

2209-12-U: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 527 (Applicant) v. Branair Design Build Inc. (Respondent) (Granted)

2217-12-U: Rory Kim-Ramjet (Applicant) v. Teamsters Canada (Local Union 938) (Respondent) v. United Parcel Service Canada Limited (Intervener) (Dismissed)

2438-12-U: Service Employees International Union Local 2, Brewery, General & Professional Workers' Union (Applicant) v. ServiceMaster of Niagara-Contract Services (Respondent) (Withdrawn)

2557-12-U: Service Employees International Union Local 2, Brewery, General & Professional Workers' Union (Applicant) v. The Salvation Army - London Recycling Operations (Respondent) (Withdrawn)

2598-12-U: Ontario Workers' Union (Applicant) v. SageCare Inc. c.o.b. as 147 Elder Street Inc. (Respondent) (Withdrawn)

2663-12-U: Service Employees International Union Local 2 Brewery General and Professional Workers Union (Applicant) v. Everclean Maintenance Services (Respondent) (Withdrawn)

2706-12-U: Halina Szelest (Applicant) v. Community Living Windsor (Respondent) (Terminated)

APPLICATION FOR INTERIM ORDER

2721-12-M: National Organized Workers (Applicant) v. Hutchinson Industries Limited (Respondent) (Withdrawn)

JURISDICTIONAL DISPUTES

0100-09-JD: Ontario Nurses' Association (Applicant) v. Hamilton Health Sciences (Respondent) v. Canadian Union of Public Employees, Local 4800 (Intervener) (Withdrawn)

0636-12-JD: GEM Campbell Terrazzo & Tile Inc. (Applicant) v. Brick and Allied Craft Union of Canada, Local 2, International Union of Bricklayers and Allied Craftworkers, Local 2, Brick and Allied Craft Union of Canada, Local 31 (Respondent) v. Masonry Industry Employers' Council of Ontario/ Ontario Masonry Contractors' Association - BACU Bargaining Committee, Brick and Allied Craft Union of Canada, Terrazzo Tile & Marble Guild of Ontario, Inc. (Intervener) (Withdrawn)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

3136-11-M: Jewish Family and Child Service of Greater Toronto (Applicant) v. Canadian Union of Public Employees, Local 265 (Respondent) (Granted)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1326-06-OH: Trevor Polmateer (Applicant) v. Sam Yako (Respondent) (Withdrawn)

3535-06-OH: Shawn McWaters (Applicant) v. Just Lubes (John McCormack) (Respondent) (Withdrawn)

1523-10-OH: Lenny Gardner (Applicant) v. Rainbow Concrete Industries Ltd. (Respondent) (Terminated)

1526-12-OH: Peter Davies (Applicant) v. Honda Canada (Respondent) (Dismissed)

1933-12-OH: Felix B. Nsubuga (Applicant) v. Toronto Transit Commission (Respondent) (Withdrawn)

1990-12-OH: Johnny Stavrou (Applicant) v. Hidden Bay Leadership Camp a division of York Professional Care and Education Inc. (Respondent) (Withdrawn)

2097-12-OH: Kenneth Edward Hoeverman (Applicant) v. Ontario Federation of Trail Riders Inc. (Respondent) (Withdrawn)

2138-12-OH: Bogdan Koscik (Applicant) v. Lakeridge Health Corporation (Respondent) (Dismissed)

2410-12-OH: Anthony Rossi (Applicant) v. Corporation of the Town of Gravenhurst (Respondent) (Withdrawn)

2445-12-OH: Andrew Ihasz (Applicant) v. The Credit Valley Hospital and Trillium Health Centre (Respondent) (Withdrawn)

2448-12-OH: Heather A. Sedore (Applicant) v. Aurora Cultural Centre (Respondent) (Withdrawn)

2595-12-OH: Jacqueline Gabriel (Applicant) v. Guardian Angel Care Inc. (Respondent) (Terminated)

COLLEGES COLLECTIVE BARGAINING ACT

0646-09-U: Ontario Public Service Employees Union (Applicant) v. Fanshawe College of Applied Arts and Technology,, Cambrian College of Applied Arts and Technology, and, Colleges Compensation and Appointments Council (Respondent) (Withdrawn)

2173-10-U: Ontario Public Service Employees Union (Applicant) v. Fanshawe College of Applied Arts and Technology (Respondent) (Withdrawn)

CONSTRUCTION INDUSTRY GRIEVANCES

3251-04-G: International Union of Bricklayers and Allied Craftworkers, Local 5 (Applicant) v. London Caulking and Installations Limited and Weathertech Restoration Services Inc. (Respondent) (Withdrawn)

1256-06-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Aecon Construction & Materials Limited (Respondent) (Withdrawn)

1667-06-G: Labourers' International Union of North America, Local 527 (Applicant) v. Bert Nibourg Construction, Nibourg Waste Management Inc. (Respondent) (Withdrawn)

1983-06-G: International Brotherhood of Electrical Workers, Local 303 (Applicant) v. Peninsula Maintenance Ltd. (Respondent) (Dismissed)

1984-06-G: International Brotherhood of Electrical Workers, Local 303 (Applicant) v. Peninsula Maintenance Ltd. (Respondent) (Dismissed)

0982-07-G: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Cambrian Construction (Sudbury) Inc., 510015 Ontario Inc. c.o.b. as Mela Investments, Mela Builders Ltd. (Respondent) (Withdrawn)

0830-08-G: The United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. 1498240 Ontario Limited (operating as Interpaving Limited) (Respondent) (Withdrawn)

0984-09-G: 413554 Ontario Limited c.o.b. as Chouinard Bros. Roofing (Applicant) v. Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Respondent) (Dismissed)

2488-09-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Black & McDonald Limited (Respondent) (Withdrawn)

1605-10-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Callaway Construction Corp. (Respondent) (Withdrawn)

1365-11-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Iron Workers District Council of Ontario, International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 765 (Applicant) v. Ontario Power Generation Inc. (Respondent) (Withdrawn)

2198-11-G: Labourers' International Union of North America, Local 527 (Applicant) v. Cornwall Gravel Co. Ltd. (Respondent) (Withdrawn)

2500-11-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 759 (Applicant) v. Kiewit - Alarie, A Partnership (Respondent) (Withdrawn)

2622-11-G: The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America on its own helalf and on behalf of Drywall Acoustic Lathing and Insulation, Local 675, United

Brotherhood of Carpenters and Joiners of America (Applicant) v. Mario Genua and Lino Genua c.o.b. as Gen's Drywall Lathing & Acoustics, Gen's Drywall Lathing & Acoustics Inc., Victory Drywall & Acoustics Inc. (Respondent) (Withdrawn)

3423-11-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Canam Group Inc. and/or Canam Steelworks Inc. (Respondent) (Withdrawn)

0294-12-G: Brick and Allied Craft Union of Canada, Local 2 and International Union of Bricklayers and Allied Craftworkers, Local 2 (Applicant) v. GEM Campbell Terrazzo & Tile Inc. (Respondent) (Withdrawn)

0391-12-G: Masonry Council of Unions Toronto and Vicinity, Bricklayers, Masons Independent Union of Canada Local 1 and Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Di Rocco Masonry Group Ltd. (Respondent) (Withdrawn)

0456-12-G: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Conservatory Group Inc./Fancy Dell Developments Inc. (Respondent) (Withdrawn)

0457-12-G: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Resform Construction Ltd. (Respondent) (Withdrawn)

0906-12-G: Masonry Council of Unions Toronto and Vicinity, Bricklayers, Masons Independent Union of Canada Local 1 and Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Di Rocco Masonry Group Ltd. (Respondent) (Withdrawn)

1450-12-G: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Empire Concrete Forming Ltd. (Respondent) (Granted)

1464-12-G: The Carpenters' District Council of Ontario, Local Union 93 (Applicant) v. Presto Construction Inc. and, 7115725 Canada Inc. (Respondent) (Endorsed Settlement)

1533-12-G: International Brotherhood of Electrical Workers, Local Union 804 (Applicant) v. Ozz Electric Inc. (Respondent) (Granted)

1627-12-G: International Union of Operating Engineers, Local 793 (Applicant) v. Associated Paving Company Ltd. (Respondent) (Withdrawn)

1631-12-G: The Residential Low Rise Forming Contractors Association of Metropolitan Toronto and Vicinity (Applicant) v. Universal Workers Union, Labourers' International Union of North America, Local 183 (Respondent) (Withdrawn)

1633-12-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. L'Equipe Rochon Inc. / Team Rochon Inc. o/a GTR Turf (Respondent) (Withdrawn)

1743-12-G: Labourers' International Union of North America, Local 493 (Applicant) v. 2125069 Ontario Inc. (Respondent) (Granted)

1864-12-G: International Union of Operating Engineers, Local 793 (Applicant) v. B. Gottardo Construction Ltd. (Respondent) (Withdrawn)

1865-12-G: International Union of Operating Engineers, Local 793 (Applicant) v. B. Gottardo Site Servicing Limited (Respondent) (Withdrawn)

2082-12-G: International Union of Bricklayers and Allied Craftworkers, Local 7 (Applicant) v. Presto Construction Inc. and 7115725 Canada Inc. c.o.b. as Presto Construction (Respondent) (Granted)

2191-12-G: The International Union of Painters and Allied Trades, Local 1891 (Applicant) v. Restoration Environmental Contractors, a Division of 836171 Ontario Inc. (Respondent) (Withdrawn)

2316-12-G: Labourers' International Union of North America, Local 837 (Applicant) v. Network Site Services Ltd. (Respondent) (Withdrawn)

2325-12-G: Labourers' International Union of North America, Local 837 (Applicant) v. A & B Rail Services Ltd. (Respondent) (Withdrawn)

2380-12-G: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Ontario Power Generation Inc. (Respondent) (Withdrawn)

2425-12-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Madesin General Contractors Ltd. (Respondent) (Withdrawn)

2474-12-G: Labourers' International Union of North America, Local 506 (Applicant) v. Specialty Precast Erectors Limited (Respondent) (Granted)

2511-12-G: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Resform Construction Ltd./1378837 Ontario Inc. (Respondent) (Withdrawn)

2522-12-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Westview Electric Contractors Inc. (Respondent) (Endorsed Settlement)

2523-12-G: Carpenters' District Council of Ontario, Local 785 (Applicant) v. All Systems Inc. (Respondent) (Withdrawn)

2531-12-G: Brick and Allied Craft Union of Canada Local 2 (Applicant) v. FMBOT Contracting Limited (Respondent) (Withdrawn)

2532-12-G: International Union Of Operating Engineers, Local 793 (Applicant) v. Ciro Excavating & Grading Ltd. (Respondent) (Granted)

2538-12-G: Labourers' International Union of North America, Local 625 (Applicant) v. Amico Infrastructures Inc. (Respondent) (Withdrawn)

2540-12-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. D.S.M. Aluminum Limited (Respondent) (Granted)

2542-12-G: Labourers' International Union of North America, Local 625 (Applicant) v. Parkway Infrastructure Constructors (Respondent) (Withdrawn)

2546-12-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. Ian Brindle c.o.b. as Brindle Glass & Mirror (Respondent) (Granted)

2551-12-G: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. Peerless Finishing Contractors Ltd. (Respondent) (Granted)

2555-12-G: Sheet Metal Workers International Association, Local 504 (Applicant) v. Lopes Mechanical Ltd. (Respondent) (Withdrawn)

2570-12-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 71 (Applicant) v. Housing Services Inc. c.o.b. HSI Solutions (Respondent) (Terminated)

2571-12-G: Labourers' International Union of North America, Local 493 (Applicant) v. Lions Demolition (Respondent) (Granted)

2578-12-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Wasif Yousif c.o.b. as Khider Electromechanical (Respondent) (Granted)

2585-12-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Extreme Electrical Services Ltd. (Respondent) (Withdrawn)

2589-12-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Symtech Innovations Ltd. (Respondent) (Withdrawn)

2608-12-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Triple D Electro Ltd. (Respondent) (Withdrawn)

2626-12-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Standard Electric (Toronto 1985) Inc. (Respondent) (Granted)

2635-12-G: International Union of Painters and Allied Trades, Local 1891 (Applicant) v. Com-Kote Interiors Inc.,, Com-Kote Inc.,, Indu-Com Coatings Corp (Respondent) (Withdrawn)

2690-12-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Croma Painting Ltd. (Respondent) (Granted)

2698-12-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Royal Windsor Mechanical Inc. (Respondent) (Granted)

2760-12-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. Tybrecam Installations Inc. (Respondent) (Withdrawn)

2762-12-G: The International Union of Painters and Allied Trades, Local Union 1795 (Applicant) v. TRB Glazing Inc. (Respondent) (Granted)

2806-12-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 221 (Applicant) v. 1000 Islands Mechanical Ltd. also operating as Thousand Islands Mechanical (Respondent) (Granted)

2834-12-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Rage Design Inc. (Respondent) (Withdrawn)

APPEALS - EMPLOYMENT STANDARDS ACT

1384-05-ES: James Thomson (Applicant) v. 1565181 Ontario Limited o/a Call-A-Cab, Director of Employment Standards (Respondent) (Withdrawn)

1310-06-ES: Genevieve Parsonage (Applicant) v. Pet Circus and, Director of Employment Standards (Respondent) (Withdrawn)

1094-07-ES: Doug Lantz (Applicant) v. Empire Fine Papers and, Director of Employment Standards (Respondent) (Withdrawn)

2775-07-ES: Mr. Issam Kndakji (Applicant) v. Nortel Networks, Director of Employment Standards (Respondent) (Terminated)

1749-08-ES: Vincent J. Cox, a Director of BLP Bronze International Ltd. (Applicant) v. Eliseo Abad, Imtiaz Ahmed, Ragmat Apiles, Bruce Armstrong, Samir Balaahouane, Samtos Billones, Donald Canda, Yadira Castillo, Yonglu Cben, Hazel Dela-Cruz, Xinggui Deng, Alex Divinagracia, Donna Drier, Waldemar Dziekonski, Silvana Frakulti, Francesca Furrari, Jonel Garcia, Gaetano Gennuso, Leticia Hernandez, Serena Hernandez, John Huys, Jackie Javier, Epifanio Jimenez, Yong Lin, Larry D. Manchester, Gabriel Manole, Florianne Milan, Ioulianos Moustakis, Felimon Narcısa, Eva T. Nasiopoulos, Andrew Oliver, John Petejan, Nisha Pinto, Susanne Pollett, Angeline Prasad, Jonathan Reyes, Emerald Salvador, Richard B. Sarabia, Jackie Shaw, Marcela Spatola, Jiva Stefanovici, S. Surendranathan, Ying (Jennifer) Ting, Arnold Villarosa, Ying Wang, Rongfeng Xie, Jose Yusay and, Director of Employment Standards (Respondent) (Withdrawn)

2977-09-ES: James A. Sutherland (Applicant) v. Saint Stephen in the Fields Anglican Church and, Director of Employment Standards (Respondent) (Withdrawn)

3113-09-ES: Mrs. Satinder Sahota (Applicant) v. Coatings 85 Limited, Director of Employment Standards (Respondent) (Withdrawn)

3518-09-ES: Julie Quigg (Applicant) v. Channel Cam Inc., Director of Employment Standards (Respondent) (Terminated)

3626-09-ES: Michael J. Frechette (Applicant) v. Canadian Car Care Inc. o/a Minute Lube, Director of Employment Standards (Respondent) (Endorsed Settlement)

0442-10-ES: Rayed Ayed (Applicant) v. Moeller Electric Ltd. and, Director of Employment Standards (Respondent) (Granted)

0611-10-ES: Paul Boucher (Applicant) v. 1667049 Ontario Ltd. o/a Northern Freedom Homes and Recreation, Director of Employment Standards (Respondent) (Dismissed)

1105-10-ES: Michael D. Topolinski, a Director of AFC Food Group Inc. (Applicant) v. Collie Allen, Santhi Asokan, Roselita Asuncion, Dragan Brekalo, Bibi Budhu, Ramon Corrion, Olimpiu Chis, Angelo Colavita, Norel Covaci, Felicia Cudjoe, Parbu Dudhnauth, Wondwosen Hailtsion, Lilawatie Jangbahadur, David Martin, Fernando Monge, Carlos Monge, Sathananthiny Paramasamy, Vimalawathy Pasupathiepillai, Marites C. Sabado, Gopi Krishna Sivapatha Suntharam, Grace Yong, Ameel Younis, Evan Younis, Director of Employment Standards (Respondent) (Granted)

1106-10-ES: Michael Dino Iaizzo, a Director of AFC Food Group Inc. (Applicant) v. Collie Allen, Santhi Asokan, Roselita Asuncion, Dragan Brekalo, Bibi Budhu, Ramon Corrion, Olimpiu Chis, Angelo Colavita, Norel Covaci, Felicia Cudjoe, Parbu Dudhnauth, Wondwosen Hailtsion, Lilawatie Jangbahadur, David Martin, Fernando Monge, Carlos Monge, Sathananthiny Paramasamy, Vimalawathy Pasupathiepillai, Marites C. Sabado, Gopi Krishna Sivapatha Suntharam, Grace Yong, Ameel Younis, Evan Younis, Director of Employment Standards (Respondent) (Granted)

1316-10-ES: Michel Perron, Berthe Lambert et Richard-Marc Lacasse, Directeurs de L'Onco Petroleum Inc. (Applicant) v. Lorann Lalonde et, Le directeur des normes d'emploi (Respondent) (Endorsed Settlement)

1317-10-ES: Richard-Marc Lacasse, Berthe Lambert et Michel Perron, Directeurs de L'Onco Petroleum Inc. (Applicant) v. Peter Dorrins et, Le directeur des normes d'emploi (Respondent) (Endorsed Settlement)

1319-10-ES: Bruce Sworik a Director of Onco Petroleum Inc. (Applicant) v. Peter Dorrins, Lorann Lalonde,, Ramanjit Boparoy and, Director of Employment Standards (Respondent) (Endorsed Settlement)

1350-10-ES: Peter Dorrins, a Director of Onco Petroleum Inc. (Applicant) v. Lorann Lalonde and, Director of Employment Standards (Respondent) (Endorsed Settlement)

1351-10-ES: Peter Dorrins, a Director of Onco Petroleum Inc. (Applicant) v. Peter Dorrins and, Director of Employment Standards (Respondent) (Endorsed Settlement)

1352-10-ES: Peter Dorrins, a Director of Onco Petroleum Inc. (Applicant) v. Ramanjit Boparoy and, Director of Employment Standards (Respondent) (Endorsed Settlement)

1374-10-ES: Berthe Lambert, Richard-Marc Lacasse et Michel Perron, Directeurs de Onco Petroleum Inc. (Applicant) v. Ramanjit Boparoy et, Le directeur des normes d'emploi (Respondent) (Endorsed Settlement)

1414-10-ES: The Big Apple Ltd. (Applicant) v. Director of Employment Standards (Respondent) (Dismissed)

2587-10-ES: Limin Bao (Applicant) v. Roadsport Limited o/a Roadsport Honda and, Director of Employment Standards (Respondent) (Endorsed Settlement)

3111-10-ES: Leor Zimerman (Applicant) v. 1573402 Ontario Limited Czehoski Bar, Director of Employment Standards (Respondent) (Endorsed Settlement)

3212-10-ES: Clarke Animal Hospital Professional Corporation (Applicant) v. Cara Frye, Director of Employment Standards (Respondent) (Dismissed)

3893-10-ES: Cornerstone Insurance Brokers Limited (Applicant) v. Maria Hardwick, and Director of Employment Standards (Respondent) (Endorsed Settlement)

4204-10-ES: Jennifer Robertson (Applicant) v. 7269943 Canada Inc. o/a Mac's Milk and, Director of Employment Standards (Respondent) (Dismissed)

4326-10-ES: Rel Foods Ltd. operating as Dairy Queen Brazier (Applicant) v. Theresa J. Smart and, Director of Employment Standards (Respondent) (Dismissed)

0501-11-ES: Nathan Robinson a Director of Cellpoint Connect (Canada) Inc. (Applicant) v. Director of Employment Standards, Randall Mileski (Respondent) (Endorsed Settlement)

0502-11-ES: Nathan Robinson a Director of Cellpoint Connect (Canada) Inc. (Applicant) v. Edwin Tsang, Director of Employment Standards (Respondent) (Endorsed Settlement)

1601-11-ES: Premier Fitness Clubs Inc. (Applicant) v. Cheryl Ramrattan and, Director of Employment Standards (Respondent) (Endorsed Settlement)

1996-11-ES: 6004938 Canada Inc. operating as CDA AZ-DZ Driver Services Inc. (Applicant) v. Alexandr Vlasenco and, Director of Employment Standards (Respondent) (Endorsed Settlement)

2570-11-ES: Sapphire Skies Promotions, Inc., operating as Eagle Eye Inc. (Applicant) v. Catherine King and, Director of Employment Standards (Respondent) (Endorsed Settlement)

2986-11-ES: Daniel Charlong, a Director of Temagami Shores Inc. (Applicant) v. Donna L. Spoelstra, Director of Employment Standards (Respondent) (Endorsed Settlement)

3087-11-ES: Leon Roy (Applicant) v. The Local Exhaust & Ventilation Company Inc. and, Director of Employment Standards (Respondent) (Endorsed Settlement)

4097-11-ES: Giovanna Spizzirri (Applicant) v. SPAR Roofing & Metal Supplies Limited, and Director of Employment Standards (Respondent) (Dismissed)

0213-12-ES: Canadian Pardon Service Ltd. o/a Canadian Pardon Services (Applicant) v. Oleg Gouriev, Director Of Employment Standards (Respondent) (Dismissed)

0374-12-ES: Burgess Leclerc Financial Group Inc. operating as Burgess Leclerc Financial Group Inc. (Applicant) v. James T. Gellatly and, Director of Employment Standards (Respondent) (Granted)

0419-12-ES: Alvin Dean Canning (Applicant) v. Home Depot of Canada Inc., Director of Employment Standards (Respondent) (Endorsed Settlement)

0424-12-ES: Allen Maintenance Ltd. (Applicant) v. Christine Hill and, Director of Employment Standards (Respondent) (Endorsed Settlement)

0510-12-ES: Anthony Graham Biss, director of Nobleton Travel Limied operating as New Tecumseth Travel (Applicant) v. Wendy Hackett, and Director of Employment Standards (Respondent) (Endorsed Settlement)

0518-12-ES: Caroline Jebanathirajah, a Director of Palmleaf PR Inc. o/a Carino Agency Inc. (Applicant) v. Christian Frias and, Director of Employment Standards (Respondent) (Endorsed Settlement)

0552-12-ES: Bayou Enterprises Incorporated operating as Golded Pizza Restaurant (Applicant) v. Frederic L Gilbert, Director of Employment Standards (Respondent) (Granted)

0763-12-ES: 1778077 Ontario Limited o/a Chili's Grill & Bar (Applicant) v. Shawn Robins, and Director of Employment Standards (Respondent) (Endorsed Settlement)

0770-12-ES: Sheri Deas (Applicant) v. The Charlotte Pantry Inc., Director of Employment Standards (Respondent) (Endorsed Settlement)

1119-12-ES: Wesley M. Thompson (Applicant) v. Grand River Foods Ltd., and Director of Employment Standards (Respondent) (Endorsed Settlement)

1155-12-ES: Melvin Hardy (Applicant) v. Native Child and Family Services of Toronto, Director of Employment Standards (Respondent) (Endorsed Settlement)

1529-12-ES: Virtualize The World Limited operating as Rouge Wireless (Applicant) v. Hamza Rehman and, Director of Employment Standards (Respondent) (Dismissed)

1554-12-ES: Ashley Randall (Applicant) v. Alliance Technology Services Inc. and, Director of Employment Standards (Respondent) (Endorsed Settlement)

1576-12-ES: 2228677 Ontario Inc. o/a Mac's Convenience (Applicant) v. Ona Crozier, and Director of Employment Standards (Respondent) (Endorsed Settlement)

1605-12-ES: Gamma-Dynacare Medical Laboratories (Applicant) v. Sophie Hassa, and Director of Employment Standards (Respondent) (Endorsed Settlement)

1618-12-ES: Mike Cooper (Applicant) v. MYE Canada Operations Inc./Myers Industries and, Director of Employment Standards (Respondent) (Endorsed Settlement)

1670-12-ES: Hoi Lam (Applicant) v. Northam Realty Advisors Limited, and Director of Employment Standards (Respondent) (Endorsed Settlement)

1676-12-ES: MinKi (Peter) Cha (Applicant) v. Cosmo Express Company Limited, and Director of Employment Standards (Respondent) (Endorsed Settlement)

1678-12-ES: Santosh Patel (Applicant) v. Imperial Parking Canada Corporation (Impark), and Director of Employment Standards (Respondent) (Endorsed Settlement)

1762-12-ES: Valerie Taylor (Applicant) v. Abernant Veterinary Services Professional Corporation, Director of Employment Standards (Respondent) (Endorsed Settlement)

1849-12-ES: Trouncy Inc. operating as South Cambridge Home Hardware Building Centre (Applicant) v. Dragan Gojsevic and, Director of Employment Standards (Respondent) (Endorsed Settlement)

1868-12-ES: NuQuest Integrated Services Inc. (Applicant) v. Ray Garneau and, Director of Employment Standards (Respondent) (Endorsed Settlement)

1888-12-ES: Lisa Cacace (Applicant) v. NRCS Inc., and Director of Employment Standards (Respondent) (Withdrawn)

1904-12-ES: Stephanie Mitchell (Applicant) v. Aditya Birla Minacs Worldwide Inc. o/a Aditya Birla Minacs and, Director of Employment Standards (Respondent) (Withdrawn)

1940-12-ES: Stuart Reddington operating as Reddington & White, Barristers & Solicitors (Applicant) v. Amanda Poirier and, Director of Employment Standards (Respondent) (Endorsed Settlement)

2028-12-ES: Mary Spencer-Thompson, Director of 2132406 Ontario Ltd. o/a Hazzard County Roadhouse (Applicant) v. David H. Copestick, Kathleen Lockerbie, Harvey Mah, Franca McCarron, Riccardo Roti, Director of Employment Standards (Respondent) (Terminated)

2135-12-ES: Charbel Journi Carte Blanche Haute Coiffure (Applicant) v. Reyna Ruiz, Director of Employment Standards (Respondent) (Endorsed Settlement)

2148-12-ES: Jason MacLennan (Applicant) v. J P Aube Restaurant Services Ltd., Director of Employment Standards (Respondent) (Endorsed Settlement)

2153-12-ES: Music Marketing Inc. (Applicant) v. Luigi Ubaldo and, Director of Employment Standards (Respondent) (Dismissed)

2157-12-ES: Fador Enterprises Inc. (Applicant) v. Lucas Meldazy, Director of Employment Standards (Respondent) (Endorsed Settlement)

2372-12-ES: 1648710 Ontario Ltd. operating as Napa Auto Parts (Newmarket) (Applicant) v. Bob Richardson and, Director of Employment Standards (Respondent) (Dismissed)

2506-12-ES: Chris Mangan-Greene and, Daniel Greene, Directors of Greene's Electric Plumbing & Heating Ltd. (Applicant) v. Derek Wheeler and, Director of Employment Standards (Respondent) (Terminated)

2517-12-ES: Tim McInroy o/a McInroy Maintenance (Applicant) v. William C. Dell and, Director of Employment Standards (Respondent) (Dismissed)

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

1239-06-HS: MTC Tire Group (Applicant) v. Shela Mirza, Inspector (Respondent) (Withdrawn)

3465-06-HS: Récupération Charland (Applicant) v. Thomas Michaud, L'inspecteur (Respondent) (Terminated)

2986-07-HS: Ministry of Health and Long-Term Care (Applicant) v. Canadian Union of Public Employees Local 2974.1 and, Rick Taggart, Inspector (Respondent) (Withdrawn)

0767-08-HS: Nor-Lag Coatings Ltd. (Applicant) v. Brian Deer, Patrick Delarosbil and, Joanne Noonan, Inspector (Respondent) (Withdrawn)

3335-08-HS: Kenora District Services Board (Applicant) v. Canadian Union of Public Employees, Local 5911 and, Steven Briscoe, Inspector (Respondent) (Withdrawn)

2413-09-HS: Deep Foundations Contractors Inc. (Applicant) v. Taggart Construction Ltd. and, Timonthy White, Inspector (Respondent) (Withdrawn)

4209-10-HS: Vale Canada Limited (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) Local 6500 and, Shaun Carter, Inspector (Respondent) (Terminated)

1621-12-HS: Peel District School Board (Applicant) v. Canadian Union of Public Employees, Local 1628 and Local 2544, A Director under the Occupational Health and Safety Act (Respondent) (Withdrawn)

2084-12-HS: USW Local 8782 (Applicant) v. US Steel Canada Lake Erie Works and, A Director under the Occupational Health and Safety Act (Respondent) (Withdrawn)

2593-12-HS: Ferrara Candy Co. Ltd. (Applicant) v. Mr. Shawn D'Ambrogio, A Director under the Occupational Health and Safety Act (Respondent) (Withdrawn)

CECBA - ESSENTIAL SERVICES (SEC. 36.1)

2764-12-M: Kenneth Leslie Sharpe (Applicant) v. Go Transit (Metrolinx) (Respondent) (Dismissed)

CECBA - EXEMP: RELIGIOUS CONVICTION/BELIEF

2352-12-M: Albert Charles Endeman (Applicant) v. Ontario Secondary School Teachers Federation, University of Guelph (Respondent) (Withdrawn)

FIRST AGREEMENT - DIRECTION

2143-09-FC: Labourers' International Union of North America, Ontario Provincial District Council, on its own behalf and on behalf of all other affiliated bargaining agents (Applicant) v. White Contracting Ltd. (Respondent) (Withdrawn)

2535-12-FC: Labourers' International Union of North America, Local 837 (Applicant) v. A. Van Egmond Construction Ltd. (Respondent) (Dismissed)

LAST OFFER VOTE

2691-12-RV: COTA Health (Applicant) v. Ontario Public Service Employees Union and its Local 548 (Respondent) (Rejected (Last Offer Vote))

PAY EQUITY ACT

3829-10-PE: Civic Association of Non-Union Employees at the City of Windsor, Laurie Parent (Applicant) v. The Corporation of the City of Windsor (Respondent) (Withdrawn)

PUBLIC SECTOR LABOUR RELATIONS TRANSITION ACT, 1997

0441-12-PS: Canadian Union of Public Employees and its Local 2197 (Applicant) v. Highland Shores Children's Aid and, Ontario Public Service Employees and its Local 344 (Respondent) (Dismissed)

Unit: "all employees of Highland Shores Children's Aid save and except Supervisors and persons above the rank of Supervisor, Communications Coordinator, Lawyer, Assistant to the Executive Director, Human Resources Assistant, Human Resources Generalist, Assistant to the Manager of Finance/Director of Services, and students employed during the school vacation period. Temporary office help may be secured for short periods of time not to exceed a sixty (60) working day period. Persons who are employed for a pilot profect or an experimental program shall become members of the bargaining unit at such time as the newly created position become regular and/or permanent, whichever comes first, and provided that the employment of that person is to a position not covered by an existing job description or elsewhere in this Collective Agreement. For purposes of interpretation, persons employed through contract in programs existing as of September 27, 2012, such as School Group Counsellor, or those employed for a specific task, and additional to the regular core program are not considered to be employees as governed by the Collective Agreement." (employees in unit)

Number of persons on voters' list at start of vote	259
Number of persons who voted	208
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	196
Number of segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots segregated and not counted	12

REFERRAL FROM MINISTER (SECTION 115 FORMERLY SECT 109)

3285-11-M: Ontario Workers' Union (Applicant) v. Steri-Pro Canada,, Service Employees International Union Local 1 Canada and, Humber River Regional Hospital (Respondent)
(Terminated)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

3301-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Country Green Homes Inc. (Respondent) (Dismissed)

3460-11-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. 1605006 Ontario Inc. o/a Rainbow Painting . (Respondent) (Dismissed)

1005-12-U: Mila Gleeson (Applicant) v. United Food and Commercial Workers International Union Local 333 (Respondent) v. Kingdom Hotels Limited dba Four Seasons Hotel Toronto (Intervener) (Dismissed)

1565-12-ES: 2295754 Ontario Inc. o/a Hampton Inn and Suites (Applicant) v. Victoria Lynne Davidson, and Director of Employment Standards (Respondent) (Disposition not vailable)

1820-12-R: The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. DH General Contracting Incorporated (Respondent) (Dismissed)

1974-12-R: Labourers' International Union of North America Local 183 (Applicant) v. F & P General Contracting & Restoration Inc. (Respondent) (Dismissed)

2365-12-G: Sheet Metal Workers International Association, Local Union No. 285 (Applicant) v. Abcomfort Corporation Abcomfort Home Services Inc. A1 Duct Express and HVAC Delivery Inc.
c.o.b. Duct Express (Respondent) (Dismissed)

2420-12-R: International Union of Painters and Allied Trades, Local 1891 (Applicant) v. 2173708 Ontario Ltd. o/a Rite-Way Drywall Systems (Respondent) (Dismissed)

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JANUARY 2013

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0721-10-R: International Brotherhood of Electrical Workers, Construction Council of Ontario (Applicant) v. Regenco LLC (Respondent)

Unit: "all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Regenco LLC in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Regenco LLC in all other sectors of the construction industry in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (16 employees in unit)

3882-11-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Landform Canada Construction Ltd. (Respondent)

Unit #1: "all construction labourers in the employ of Landform Canada Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non working foreman" (20 employees in unit)

Unit #2: "all construction labourers in the employ of Landform Canada Construction Ltd. in all sectors of the Construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (20 employees in unit)

0638-12-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Aquicon Construction Co. Ltd. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Aquicon Construction Co. Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all painters and painters' apprentices in the employ of Aquicon Construction Co. Ltd. in all sectors of the construction industry in the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (0 employees in unit)

1938-12-R: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Maystar General Contractors Inc. (Respondent)

Unit: "all construction labourers in the employ of Maystar General Contractors Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (0 employees in unit)

2315-12-R: Labourers' International Union of North America Ontario Provincial District Council (Applicant) v. Toronto 1enith Contracting Limited Toronto 1enith Inc. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener)

Unit: "all construction labourers, carpenters and carpenters¿ apprentices in the employ of Toronto 1enith Contracting Limited in that portion of the District of Algoma south of the 49th parallel of latitude, in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non working forepersons and persons above the rank of non working foreperson" (11 employees in unit)

2373-12-R: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 765 (Applicant) v. Abhe & Svoboda, Inc. (Respondent)

Unit: "all ironworkers and ironworkers' apprentices in the employ of Abhe & Svoboda, Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non working foremen and persons above the rank of non-working foreman all ironworkers and ironworkers' apprentices in the employ of Abhe & Svoboda, Inc. in all sectors of the construction industry in the United Counties of Stormont, Dundas and Glengarry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (0 employees in unit)

2469-12-R: Canadian Office and Professional Employees Union Local 343 (Applicant) v. Trader Corporation (also operating as "autoTRADER.ca") (Respondent)

Unit: "all outside sales employees of Trader Corporation operating as Autotrader.ca in the Province of Ontario in the commercial automotive passenger vehicle and commercial non passenger vehicle sales save and except Regional Sales Managers and persons above the rank of Regional Sales Manager" (42 employees in unit)

2725-12-R: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. Fresco Enterprises Inc. (Respondent)

Unit: "all painters and painters¿ apprentices in the employ of Fresco Enterprises Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all painters and painters¿ apprentices in the employ of Fresco Enterprises Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

2842-12-R: Universal Workers Union, Labourers' International of North America, Local 183 (Applicant) v. Bravo Structural Restoration Inc. (Respondent)

Unit: "all construction labourers in the employ of Bravo Structural Restoration Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2844-12-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 6997384 Canada Corp. o/a Ante Batur (Respondent)

Unit: "all construction labourers in the employ of 6997384 Canada Corp. o/a Ante Batur in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all construction labourers in the employ of 6997384 Canada Corp. o/a Ante Batur in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

2890-12-R: Labourers' International Union of North America Local 183 (Applicant) v. Kertl Finish Carpentry Limited (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Kertl Finish Carpentry Limited in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2922-12-R: Allied Construction Employees Local 1030, United Brotherhood of Carpenters and Joiners of America (Applicant) v. P.G. Onisto Construction Inc. (Respondent)

Unit: "all carpenters and carpenters¿ apprentices in the employ of P.G. Onisto Construction Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non¿working foremen and persons above the rank of non¿working foreman" (2 employees in unit)

3030-12-R: Labourers' International Union of North America Local 183 (Applicant) v. D C Fence & Contracting Inc. (Respondent)

Unit: "all construction labourers in the employ of D C Fence & Contracting Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non working foreman of all construction labourers in the employ of D C Fence & Contracting Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3034-12-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. 1099945 Ontario Ltd. o/a EMAC (Respondent)

Unit: "all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of 1099945 Ontario Ltd. o/a EMAC in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of 1099945 Ontario Ltd. o/a EMAC in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham , excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman"
(3 employees in unit)

3053-12-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Consbec Inc. (Respondent)

Unit: "all construction labourers and all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of Consbec Inc. in all sectors of the construction industry in the County of Lanark, the geographic Townships of South Crosby, Bastard, Kitley, Wolford, Oxford (on Rideau) and South Gower and all lands north thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non- working foreman" (5 employees in unit)

Bargaining Agents Certified Subsequent to Vote

0905-12-R: Carleton University Postdoctoral Association (Applicant) v. Carleton University (Respondent)

Unit: "all persons employed as Postdoctoral Fellows by Carleton University, in the City of Ottawa, save and except the following: (a) persons who exercise managerial functions or who are employed in a confidential capacity in matters related to labour relations; and (b) persons when performing work for which another trade union has bargaining rights under the Ontario Labour Relations Act; (c) persons employed as research assistants, research associates, research fellows, clinical fellows, clinical scholars, visiting scholars, visiting researchers and visiting faculty; and pending the resolution of their status, excluding as well, Postdoctoral Fellows who apply for and are awarded funding from any source other than Carlton University, without limiting the generality of the foregoing, NCSERC, SSHRC, CIHR or similar foundations." (66 employees in unit)

Number of names of persons on revised voters' list	55
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' List	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	5

1703-12-R: Labourers' International Union of North America, Local 183 (Applicant) v. DNM Lock-Block Ltd. (Respondent)

Unit: "All employees of DNM Lock-Block Ltd. at 595B Commissioners Street in the City of Toronto save and except supervisors, persons above the rank of supervisor, office and clerical staff."
(5 employees in unit)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names do not appear on voters' List	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	4

2171-12-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Tamarack Tree Care Ltd. (Respondent)

Unit: "all employees of Tamarack Tree Care Ltd. working in and out of the City of Ottawa save and except supervisors, persons above the rank of supervisor, and office and clerical staff" (25 employees in unit)

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	9
Number of ballots segregated and not counted	0

2498-12-R: Canadian Union of Public Employees (Applicant) v. 1iptrack Ltd. (Respondent)

Unit: "all dispatch supervisors employed by 1iptrack Ltd. in the City of Ottawa, Ontario, save and except team leaders, persons above the rank of team leader and employees in bargaining units for which any trade union held bargaining rights as of November 20, 2012" (12 employees in unit)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	0

2572-12-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Municipality of Hastings Highlands (Respondent)

Unit: "all employees employed by the Corporation of the Municipality of Hastings Highlands save and except Chief Administrative Officer/Treasurer, Deputy Treasurer/Tax Collector, Acting Clerk and any Deputy Clerk, Chief Building Official, Transportation Manager, Manager of Safety Waste and Facilities, Coordinator of Administrative Services, Fire Chief and supervisors above the rank of the aforementioned positions" (26 employees in unit)

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	25
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	21

Number of ballots marked against applicant	1
Number of ballots segregated and not counted	3

2768-12-R: Ontario Workers' Union (Applicant) v. St. Michael's Hospital (Respondent)

Unit: "all technicians and technologists employed by St. Michael's Hospital in the City of Toronto in its Heart and Vascular Laboratories, save and except clerical staff, professional medical staff, those already represented by a trade union on December 12, 2012, supervisors and managers and those above the rank of supervisor or manager Clarity Note: For clarity, this includes technicians and technologists employed in the Cardiac Catheterilation Laboratory, the ECG Laboratory, the Echocardiography Laboratory, and the Vascular Ultrasound Laboratory." (24 employees in unit)

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	0

2783-12-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. CSH-HCN Lessee (Leamington) LP o/a Leamington Court (Respondent)

Unit: "all employees of CSH-HCN Lessee (Leamington) LP o/a Leamington Court in the town of Leamington, save and except Supervisors, persons above the rank of Supervisors, Activity Aides, Office, Clerical and Sales Staff." (86 employees in unit)

2871-12-R: Grand River Valley Health Care Employee's Union Local 305 affiliated with the Christian Labour Association of Canada (Applicant) v. Haldimand War Memorial Hospital (Respondent)

Unit: "Paramedical employees of Haldimand War Memorial Hospital in Haldimand County, Ontario, save and except: Professional Medical Staff, Department Heads, Chiefs, Assistant Chiefs, Directors, Assistant Directors, Supervisors and those above the rank of Supervisors, Interns and Students and Employees covered by existing collective agreements and certifications and employees privy to confidential matters of the Hospital relating to finance or labour relations." (23 employees in unit)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

2912-12-R: UFCW Canada, Local 1000A (Applicant) v. LensCrafters International Inc. (Respondent)

Unit: "all employees of Lenscrafters International Inc. located at 5000 Highway 7 #305-6, Markham, Ontario of the Markville Shopping Centre, save and except General Manager, Retail Manager, Lab Manager, Sales Supervisor and persons above the rank of Sales Supervisor" (17 employees in unit)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

2967-12-R: Ontario Workers' Union (Applicant) v. Women & Children's Shelter of Barrie (Respondent)

Unit: "all employees of the Women & Children's Shelter of Barrie in the Municipality of Barrie and the County of Simcoe, save and except Supervisors and persons above the rank of Supervisors or Managers" (25 employees in unit)

Number of names of persons on revised voters' list	29
Number of persons who cast ballots	28
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	28
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	12
Number of ballots segregated and not counted	0

Applications for Certification Dismissed Without Vote

0598-08-R: Canadian Construction Workers' Union (Applicant) v. Abtrex Contractors Inc. (Respondent) v. The formwork Council of Ontario (Intervener)

2822-12-R: Healthcare, Office and Professional Employees Union, Local 2220, UBCJA (Applicant) v. Leamington Court and/or The Chartwell Seniors Housing REIT (Respondent) v. CAW-Canada (Intervener)

2889-12-R: International Brotherhood of Electrical Workers Local 530 (Applicant) v. 1317409 Ontario Limited c.o.b. as 3-Phase Electrical (Respondent)

Applications for Certification Dismissed Subsequent to Vote

0243-04-R: Central Ontario Regional Council of Carpenters, Drywall and Allied Workers United Brotherhood of Carpenters and Joiners of America (Applicant) v. Marciano Doors & Trim (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Marciano Doors & Trim in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in in the County of Peterborough and the geographic Township of Manvers in the

County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foreman and persons above the rank of non-working foreman." (3 employees in unit)

Number of names of persons on revised voters' list	0
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	3

1468-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Parkview Excavation Services Inc., 1494282 Ontario Inc. and 1490623 Ontario Inc. o/a Parkview Homes (Respondent)

Unit: "all construction labourers and all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same and employees engaged as surveyors in the employ of the responding parties ("Parkview") in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non- working foreman" (8 employees in unit)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	9
Number of ballots segregated and not counted	1

2882-12-R: Healthcare, Office and Professional Employees Union, Local 2220, UBJCA (Applicant) v. Nanticoke Christian Senior Citizen Home Inc. o/a Parkview Meadows Retirement Village (Respondent) v. Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Intervener)

Unit: "all employees of Parkview Meadows Christian Retirement Village save and except supervisors and persons above the rank of supervisor" (102 employees in unit)

Number of names of persons on revised voters' list	100
Number of persons who cast ballots	79
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	79
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	19
Number of ballots marked in favour of intervener	60
Number of ballots segregated and not counted	0

Applications for Certification Withdrawn

0082-10-R: Hospitality & Service Trades Union Local 261 (Applicant) v. Novotel Canada Inc., Accor Canada Inc. and Novotel Ottawa (Respondent)

0507-12-R: Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Applicant) v. Niagara Support Services (Respondent)

1741-12-R: Labourers' International Union of North America Local 183 (Applicant) v. Rossbro Developments Inc. also d.b.a. The Rossbro Development Corporation, Residences of Springhill Inc. (Respondent) v. M.G.R. Contracting and Maintenance Ltd. (Intervener)

2374-12-R: Iron Workers District Council of Ontario (Applicant) v. Cornerstone Detention Products, Inc. (Respondent)

2903-12-R: Canadian Union of Public Employees (Applicant) v. Green for Life (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2085-06-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. David Thompson (Respondent) (Terminated)

0248-09-R: Communications, Energy and Paperworkers Union of Canada, Local 593-0 (Applicant) v. Petro-Canada Oakville Terminal, Petro-Canada Keele Terminal, Petro-Canada London/Sarnia Terminal, Petro-Canada Ontario (Respondent) (Withdrawn)

0945-09-R: UNITE HERE (Applicant) v. Novotel Canada Inc. Accor Canada Inc. and Novotel Mississauga o/a Hotel Novotel Toronto Mississauga Centre (Respondent) (Withdrawn)

SALE OF A BUSINESS

3747-08-R: International Union of Bricklayers and Allied Craftworkers, Local 6 (Applicant) v. De Angelis Construction Inc. and, Artisan Masonry Inc. (Respondent) v. Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 494 (Intervener) (Terminated)

0031-09-R: Labourers' International Union of North America, Local 625 (Applicant) v. De Angelis Construction Inc. and, Artisan Masonry Inc. (Respondent) v. Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 494 (Intervener) (Terminated)

0700-10-R: The Association of Management, Administrative and Professional Crown Employees of Ontario ("AMAPCEO") (Applicant) v. The Crown in Right of Ontario and, College Employer Council (Respondent) (Terminated)

1642-10-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Jamwood Developments Inc., Mario Cinelli in his personal capacity and c.o.b. as Cinelli, Mario in Trust, Cintrex Property Management Inc., Surrey Construction Inc. a.k.a. A & M Woodworking Inc., Mark Cinelli in his personal capacity and c.o.b. as A-Motion Accessible Lifestyle Solutions, Mar Jam Investments Ltd., Surrey Plaza Limited and (Respondent) (Withdrawn)

0227-12-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Chatham Kent Hydro Inc.,, Entegrus Powerlines Inc. and, Middlesex Power Distribution Corporation (Respondent) v. Power Workers' Union, C.U.P.E. Local 1000 - C.L.C. (Intervener) (Granted)

0955-12-R: Teamsters Local Union No. 230 (Applicant) v. Dufferin Concrete and, Ontario Redimix (Respondent) v. Christian Labour Association of Canada (Intervener) (Dismissed)

1922-12-R: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Avenue Park Masonry Ltd. and/or 116451 Ontario Ltd. and, Downtown Bricklayers Inc. and, Alenquer Masonry Inc. and, Uptown Masonry Inc. (Respondent) (Withdrawn)

2034-12-R: Teamsters Local Union No. 230 (Applicant) v. National East Ready Mix Corp. and, 2339255 Ontario Inc. (Respondent) (Withdrawn)

2311-12-R: Labourers' International Union of North America, Local 837 (Applicant) v. Yirka Contracting (2006) Ltd., Regional Sewer and Watermain Ltd. (Respondent) (Withdrawn)

2357-12-R: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers Local 736 (Applicant) v. 1804573 Ontario Inc. o/a STL Installations, Aldershot Structural (1986) Limited (Respondent) (Withdrawn)

2582-12-R: Ontario Council of the International Union of Painters and Allied Trades and International Union of Painters and Allied Trades Local 1891 (Applicant) v. Anik Interiors Inc. and, Kina Construction Limited (Respondent) (Granted)

2678-12-R: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Onsite Supply Company Limited o/a Arromba Trim & Supply, Imperial Trim & Supply Inc., Crown Mantels & Woodworking Ltd., 1536288 Ontario Inc., Victor Arromba Inc. (Respondent) (Dismissed)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2495-12-R: Jacques Lafond and a Group of Employees of Rainbow Concrete (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Rainbow Concrete Industries Limited (Intervener) (Granted)

Unit: "all employees of Rainbow Concrete Industries Ltd. working in, at and out of 2477 Maley Drive, Sudbury, Ontario, save and except office and clerical staff, sales staff, students, non-working forepersons and persons above the rank of non-working foreperson." (62 employees in unit)

Number of names of persons on revised voters' list	73
Number of persons who cast ballots	53
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	42
Number of segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	7
Number of ballots marked against respondent	35
Number of ballots segregated and not counted	11

2736-12-R: A group of employees of Canadian Mini-Warehouse Properties Company including Sabrina Inch, Priyadev De Mel, Yolande Byrde, Evashia Wilks and Jennifer Modeland (Applicant) v. United Food and Commercial Workers International Union (UFCW Canada) (Respondent) v. Canadian Mini-Warehouse Properties (Intervener) (Granted)

Unit #1: "All property Managers, Assistant Property Managers, Relief Property Managers and Maintenance Managers employed by Canadian Mini-Warehouse Properties Company in the City of Brampton, City of Oakville, City of Toronto and City of Mississauga save and except District Managers, persons above the rank of District Manager, Regional Managers, and office and administration staff." (60 employees in unit)

Number of names of persons on revised voters' list	60
Number of persons who cast ballots	54
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	54
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	25
Number of ballots marked against respondent	28
Number of ballots segregated and not counted	0

2898-12-R: Jessica Smith on behalf of employees at Swiss Chalet #1250 (Applicant) v. United Food & Commercial Workers, Local 206 (Respondent) (Dismissed)

2921-12-R: Diane Lavergne (Applicant) v. COPE 343 (Respondent) (Granted)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

3605-09-U: Rainbow Concrete Industries Limited (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) (Withdrawn)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

2947-12-U: The Minister of Education (Applicant) v. Elementary Teachers' Federation of Ontario and Sam Hammond (Respondent) v. Ontario Public School Boards' Association, Ontario Secondary School Teachers' Federation (Intervener) (Granted)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2970-00-U: Dennis Fordyce (Applicant) v. Power Workers' Union (Respondent) v. Ontario Power Generation Inc. (Intervener) (Dismissed)

2641-05-U: International Union of Bricklayers and Allied Craftworkers Locals 1, 2, 4, 5, 6, 10, 12, 20, 23, 25, 28, 29 and 31, and Kerry Wilson and Ron Smith (Applicant) v. Bricklayers and Trowel Trades International Pension Plan Canada, and, Eugene George, and, International Union of Bricklayers and Allied Craftworkers (Respondent) v. International Union of Bricklayers and Allied Craftworkers, Local 7 (Intervener) (Terminated)

1319-06-U: York University Staff Association (Applicant) v. York University (Respondent) (Terminated)

0506-07-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Struct-Con Construction Ltd. (Respondent) (Withdrawn)

2369-07-U: Barbara McClelland (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Ministry of Community Safety and Correctional Services (Intervener) (Terminated)

2826-07-U: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Regal Electricians Inc. (Respondent) (Terminated)

0601-08-U: Canadian Construction Workers' Union (Applicant) v. Abtrex Contractors Inc. (Respondent) (Dismissed)

2540-08-U: Labourers' International Union of North America, Ontario Provincial District Council and Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Graham Bros. Construction Limited, Graham Bros. Aggregates Limited (Respondent) (Terminated)

2815-08-U: Christina Aylward (Applicant) v. Nicole Desjardins Local 1110 Ontario Federation Health Care Workers (Respondent) (Terminated)

0078-09-U: Syndicat Canadien de la Fonction Publique (Applicant) v. Genesis Gardens Inc. o/a Foyer St. Viateur Nursing Home (Respondent) (Terminated)

0249-09-U: Communications, Energy and Paperworkers Union of Canada, Local 593-0 (Applicant) v. Petro-Canada Oakville Terminal, Petro-Canada Keele Terminal, Petro-Canada London/Sarnia Terminal, Petro-Canada Ontario (Respondent) (Withdrawn)

0682-09-U: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Streetcar Developments Inc. and, Streetcar Construction Ltd. (Respondent) (Withdrawn)

0935-09-U: Ruth Durand (Applicant) v. Association des enseignantes et des enseignants franco-ontariens (Respondent) v. Conseil scolaire de district du Centre-Sud Ouest (Intervener) (Dismissed)

2182-09-U: Kenneth Mohr (Applicant) v. CAW Local 88 (Respondent) (Withdrawn)

3152-09-U: Rainbow Concrete Industries Limited (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) (Withdrawn)

3582-09-U: International Union of Operating Engineers, Local 793 (Applicant) v. Rainbow Concrete Industries Ltd. (Respondent) (Withdrawn)

0021-10-U: Hospitality & Service Trade Union, Local 261 and Jeffrey Segat (Applicant) v. Novotel Canada Inc., Accor Canada Inc. and Novotel Ottawa (Respondent) (Withdrawn)

0494-10-U: Hospitality & Service Trades Union Local 261, Nicole Touissant, Marta Kebede, Ariat Oweithi and Catalina Fabian (Applicant) v. Novotel Canada Inc., Accor Canada Inc. and Novotel Ottawa (Respondent) (Withdrawn)

1522-10-U: International Union of Operating Engineers, Local 793 (Applicant) v. Rainbow Concrete Industries Ltd. (Respondent) (Withdrawn)

1596-10-U: Elementary Teachers' Federation of Ontario Ottawa Carleton Elementary Teachers' Federation (Applicant) v. Lyall Thompson,, Ann O'Dacre,, Nicole Turpin and, Lorrie Lovett (Respondent) (Terminated)

3756-10-U: John Veldman (Applicant) v. CAW-Canada, Local 127 (Respondent) (Dismissed)

3836-10-U: Ontario Public Service Employees Union (Applicant) v. Municipal Property Assessment Corporation (Respondent) (Withdrawn)

0627-11-U: Hospitality & Service Trades Union Local 261 and Sam Kaing (Applicant) v. Novotel Canada Inc., Accor Canada Inc. and Novotel Ottawa (Respondent) (Withdrawn)

1202-11-U: Milan Kovacevic (Applicant) v. Service Employees International Union Local 1 CANADA (Respondent) (Dismissed)

1247-11-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. MX Constructors Inc., Morrison Excavating Services Inc., Construction Workers Local 52 affiliated with the Christian Labour Association of Canada (Respondent) (Terminated)

1754-11-U: Ontario Workers' Union (Applicant) v. Service Employees International Union, Local 1 Canada (Respondent) v. Humber River Regional Hospital, William Osler Health Centre (Intervener) (Withdrawn)

2108-11-U: Tara Satnarine (Applicant) v. Ontario Public Service Employees Union (Respondent) v. The Crown in Right of Ontario as represented by the Ministry of Attorney General (Intervener) (Terminated)

2737-11-U: Hospitality & Service Trades Union, Local 261 and, Esperance Umwilaninde (Applicant) v. Novotel Canada Inc., Accor Canada Inc. and Novotel Ottawa (Respondent) (Withdrawn)

2826-11-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 251 (Applicant) v. Orchard Grove Child Care Co-operative Centre Inc. (Respondent) (Withdrawn)

2945-11-U: Florence Dass (Applicant) v. UFCW Canada Local 1000A (Respondent) (Terminated)

3113-11-U: Provincial Employers Bargaining Agency - Labourers ("PEBAL") and Ontario Masonry Contractors' Association ("OMCA") (Applicant) v. Labourers' International Union of North America, Local 527 (Respondent) v. Labourers International Union of North America – Ontario Provincial District Council ("LIUNA-OPDC") Labourers Employee Bargaining Agency ("LEBA") (Intervener) (Withdrawn)

3392-11-U: Karen Arlene Darley (Applicant) v. Ontario English Catholic Teachers' Association (Respondent) v. Huron-Superior Catholic District School Board (Intervener) (Dismissed)

3475-11-U: Tara Marenchin (Applicant) v. Ontario Federation of Healthcare Workers LIUNA Local 1110 and Representatives (Respondent) (Withdrawn)

4093-11-U: International Union of Operating Engineers, Local 793 (Applicant) v. Rainbow Concrete Industries Ltd. (Respondent) (Withdrawn)

0029-12-U: Teamsters Local Union No. 879 (Applicant) v. RPM Environment Ltd. (Respondent) (Withdrawn)

0031-12-U: Healthcare, Office and Professional Employees Union, UBCJA, Local 2220 (Applicant) v. Ontario Federation of Healthcare Workers, LIUNA Local 1110 and, Chartwell Seniors Housing REIT and, Bella Seniors Care (Respondent) (Withdrawn)

0168-12-U: Gerry McDermott (Applicant) v. Teamsters Local Union 938 (Respondent) v. Wilson's Truck Lines Limited (Intervener) (Dismissed)

0364-12-U: Sherry Leboeuf (Applicant) v. Canadian Office and Professional Employers Union Local 529 (Respondent) (Withdrawn)

0609-12-U: Tara Marié Myers (Applicant) v. Ontario Workers Union (Respondent) (Dismissed)

0658-12-U: Ms. Nicole Lavoie (Applicant) v. International Brotherhood of Boilermakers, Local 128 (Respondent) (Withdrawn)

0702-12-U: United Food and Commercial Workers Canada, Local 175 (Applicant) v. Loudon Brothers Ltd. (Respondent) (Withdrawn)

1280-12-U: Communications, Energy and Paperworkers Union of Canada, Local 87-M Southern Ontario Newsmedia Guild (Applicant) v. Ming Pao Newspapers (Canada) Ltd. (Respondent) (Withdrawn)

1314-12-U: Service Employees International Union Local 1, Canada (Applicant) v. Valleyview Residence (Respondent) v. Gailene Durrant Lennon, Patrick Cejudo, Florence Brown, Adon Adap, Luisa Civera, Andrew Jardine, Sylvia Jackson and, Heidi Malon (Intervener) (Withdrawn)

1390-12-U: Tina Manu (Applicant) v. CAW/TCA Canada Local 462 (Respondent) v. Honeywell Limited (Intervener) (Dismissed)

1436-12-U: Chris-Ann Bradshaw (Applicant) v. Ontario Public Service Employees Union (OPSEU) (Respondent) v. Complex Services Inc. (Intervener) (Withdrawn)

1477-12-U: Ontario Federation of Health Care Workers, LIUNA Local 1110 (Applicant) v. Niagara Support Services (Respondent) (Withdrawn)

1710-12-U: International Union of Operating Engineers, Local 793 (Applicant) v. Lakeside Contracting Company Limited (Respondent) (Withdrawn)

1725-12-U: Michael Vorobej (Applicant) v. United Steelworkers (Respondent) v. ARAMARK Canada Ltd. (Intervener) (Dismissed)

1727-12-U: Darryl McKay (Applicant) v. United Steelworkers (Respondent) v. ARAMARK Canada Ltd. (Intervener) (Dismissed)

1728-12-U: Antonny Garcia (Applicant) v. United Steelworkers (Respondent) v. ARAMARK Canada Ltd. (Intervener) (Dismissed)

1730-12-U: Tu Vu (Applicant) v. United Steelworkers (Respondent) v. ARAMARK Canada Ltd. (Intervener) (Dismissed)

1737-12-U: Healthcare, Office and Professional Employees Union, Local 2220, UBCJA (Applicant) v. Labourers' International Union of North America, Local 837 (Respondent) (Withdrawn)

1764-12-U: Labourers' International Union of North America, Local 183 (Applicant) v. DNM Lock-Block Ltd. (Respondent) (Withdrawn)

1771-12-U: Alexander Vetrenko (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Local 9597 (Respondent) v. Securitas Canada Limited (Intervener) (Dismissed)

1836-12-U: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Compass Canada Support Services Ltd., and Symcor Inc. (Respondent) (Withdrawn)

1844-12-U: Karen Van Puymbroeck (Applicant) v. Ontario Public Service Employees Union (Respondent) (Dismissed)

1984-12-U: United Food and Commercial Workers International Local 175 (Applicant) v. Canadian Mini-Warehouse Properties Company o/a Public Storage (Respondent) (Withdrawn)

2033-12-U: Teamsters Local Union No. 230 (Applicant) v. National East Ready Mix Corp. and, 2339255 Ontario Inc. (Respondent) (Withdrawn)

2063-12-U: Healthcare, Office and Professional Employees Union, Local 2220, UBCJA (Applicant) v. Bella Senior Care Residences Inc. o/a Bella Senior Care Residence and, Labourers' International Union of North America, Local 1110 (Respondent) (Withdrawn)

2073-12-U: Healthcare, Office and Professional Employees Union, Local 2220, UBCJA (Applicant) v. Labourers' International Union of North America, Local 837 (Respondent) (Withdrawn)

2120-12-U: Jack Lemos (Applicant) v. The Canadian Union of Public Employees (CUPE), Local 1483 (Respondent) v. Dufferin-Peel Catholic District School Board (Intervener) (Withdrawn)

2168-12-U: Gérald Davidson (Applicant) v. Canadian Union of Public Employees and its Local 1997 (Respondent) (Withdrawn)

2194-12-U: Labourers' International Union of North America Local 183 (Applicant) v. Rossbro Developments Inc. also d.b.a. The Rossbro Development Corporation, Residences of Springhill Inc. (Respondent) (Withdrawn)

2264-12-U: International Union of Painters and Allied Trades Local 114 (Applicant) v. Abhe & Svoboda Inc. (Respondent) (Withdrawn)

2285-12-U: International Union of Painters and Allied Trades Local 114 (Applicant) v. Abhe & Svoboda Inc. (Respondent) (Withdrawn)

2386-12-U: Ontario Nurses' Association (Applicant) v. White Eagle Residence (Respondent) (Withdrawn)

2437-12-U: International Union of Painters and Allied Trades Local 114 (Applicant) v. Abhe & Svoboda Inc. (Respondent) (Withdrawn)

2573-12-U: Peter James Morrison (Applicant) v. Teamsters Union Hamilton, Local 879 (Respondent) (Withdrawn)

2576-12-U: Gary Lacroix (Applicant) v. Canadian Union of Public Employees Local 4357 (Respondent) v. District of Timiskaming Social Services Administration Board (Intervener) (Withdrawn)

2614-12-U: Nicholas A Precopi (Applicant) v. The Canadian Union of Public Employees and its Local 905 (York Region Unit) (Respondent) (Withdrawn)

2755-12-U: Kenneth Leslie Sharpe (Applicant) v. Amalgamated Transit Union Local 1587 (Respondent) v. GO Transit (A Division of Metrolinx) (Intervener) (Dismissed)

2793-12-U: Labourers' International Union of North America, Local 183 (Applicant) v. Beacon Roofing Supply Canada Company (Respondent) (Dismissed)

2853-12-U: Optilinx Systems Inc. and Nick Conforti (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) (Dismissed)

3127-12-U: Cong Guang Ihan (Applicant) v. University Health Network (Respondent) (Terminated)

APPLICATION FOR INTERIM ORDER

2167-12-M: Healthcare, Office and Professional Employees Union, Local 2220, UBCJA (Applicant) v. Labourers' International Union of North America, Local 837 (Respondent) (Withdrawn)

2792-12-M: Labourers' International Union of North America, Local 183 (Applicant) v. Beacon Roofing Supply Canada Company and, Safe Work Force Inc. (Respondent) (Dismissed)

3045-12-M: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Advantage Engineering Inc. (Respondent) (Withdrawn)

JURISDICTIONAL DISPUTES

2758-06-JD: Universal Workers Union, L.I.U.N.A., Local 183 (Applicant) v. Powerline Plus Ltd. (Respondent) v. The International Brotherhood of Electrical Workers, Local 353 (Intervener) (Terminated)

3808-11-JD: Dineen Construction Limited (Applicant) v. Universal Workers Union, Labourers' International Union of North America, Local 183, International Brotherhood of Painters and Allied Trades, District Council 46, Monalt Environmental Inc. (Respondent) (Withdrawn)

0239-12-JD: United Brotherhood of Carpenters and Joiners of America, Millwrights Local 1410 (Applicant) v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 765 and, Process Mechanical Installations (Respondent) (Terminated)

0288-12-JD: Carpenters' District Council of Ontario and its Local 18 (Applicant) v. Dufferin Construction Company, a Division of Holcim (Canada) Inc. and, Labourers' International Union of North America, Local 837 (Respondent) v. Electrical Power Systems Construction Association (Intervener) (Withdrawn)

1921-12-JD: Allied Construction Employees Local 1030, United Brotherhood of Carpenters and Joiners of America (Applicant) v. International Union of Painters and Allied Trades, Local 557, Phoenix Gunite Services Ltd. (Respondent) (Withdrawn)

2778-12-JD: The Carpenters' District Council of Ontario, Local 1669 (Applicant) v. Pomerleau Inc. and, Painters and Allied Trades International Union, Local 1671 (Respondent) (Withdrawn)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1560-12-OH: Pierre Bellemare (Applicant) v. Vale Canada Limited (Respondent) (Withdrawn)

2024-12-OH: Labourers International Union of North America, Local 183 on behalf of George Desgrosseilliers (Applicant) v. DNM Lock-Block Ltd. (Respondent) (Withdrawn)

2371-12-OH: Isaac Barnes (Applicant) v. Machinecraft Industries Limited (Respondent) (Withdrawn)

2395-12-OH: Jeff Lolier (Applicant) v. Express Employment Professionals and, CF Industries (Respondent) (Withdrawn)

2401-12-OH: Jeff Verhagen (Applicant) v. Thames Valley District School Board (Respondent) (Withdrawn)

2412-12-OH: Michael Luce (Applicant) v. George Wickens (Respondent) (Withdrawn)

2442-12-OH: Dominique Pochette (Applicant) v. Chai Kosher Poultry (Respondent) (Withdrawn)

2588-12-OH: John Bryan (Applicant) v. Lloyds Laboratories (Respondent) (Withdrawn)

2615-12-OH: Nicholas A Precopi (Applicant) v. The Corporation of the City of Vaughan (Respondent) (Withdrawn)

2619-12-OH: Patrick McKenna (Applicant) v. Epsilon Industries Inc. (Respondent) (Dismissed)

2697-12-OH: Amy Ashton (Applicant) v. Knechtel Foods (Respondent) (Endorsed Settlement)

2703-12-OH: Claire Farella (Applicant) v. St. Lawrence College (Respondent) (Withdrawn)

2708-12-OH: Ashley MacDougall (Applicant) v. Johnny Quests Adventures in Food & Drink (Respondent) (Withdrawn)

2719-12-OH: Mehdi Keshavarl Yousefi (Applicant) v. Eugene Collision Limited (Respondent) (Withdrawn)

2743-12-OH: Darren Cropper (Applicant) v. Township of Bonfield - Fire Department (Respondent) (Withdrawn)

2744-12-OH: Michael Knapp (Applicant) v. Maureen Lucas, President LucasWorks! Recruitment & Human Resources Specialists (Respondent) (Withdrawn)

2745-12-OH: Adrian Jordan Douglas Bradt (Applicant) v. Brown Stones Sports Lounge & Restaurant Ltd. (Respondent) (Withdrawn)

2753-12-OH: Stewart Delion (Applicant) v. Rempel Concrete Pumping Ltd. (Respondent) (Withdrawn)

2765-12-OH: David Dyer (Applicant) v. Royal Canadian Legion MacDonald Branch 183 (Respondent) (Withdrawn)

2780-12-OH: Darlene Jacobs (Applicant) v. Canadian Tire Store #193 (Respondent) (Withdrawn)

2840-12-OH: Cathy Deserranno (Applicant) v. The Corporation of the City of Windsor (Respondent) (Withdrawn)

2893-12-OH: Michael Dumond (Applicant) v. St. Lawrence Parks Commission (Respondent) (Dismissed)

3036-12-OH: Patricia Darlene Vogel (Applicant) v. Caressant Care Nursing and Retirement Homes Ltd. (Respondent) (Terminated)

CONSTRUCTION INDUSTRY GRIEVANCES

1446-06-G: International Union of Painters and Allied Trades, Local 1494 (Applicant) v. Greater Essex County District School Board (Respondent) (Withdrawn)

2301-06-G: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 1210166 Ontario Inc. o/a DCC Carpentry (Respondent) (Dismissed)

2052-08-G: Labourers' International Union of North America, Local 1059 (Applicant) v. PCL Constructors Canada Inc. (Respondent) v. Greater Ontario Regional Council of Carpenters, Drywall & Allied Workers, Local 1946 (Intervener) (Withdrawn)

0264-09-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Electrical Power Systems Construction Association and, Ontario Power Generation Inc. (Respondent) (Dismissed)

0266-09-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Aecon Industrial Division of Aecon Group Inc. (Respondent) (Dismissed)

2013-09-G: International Union of Elevator Constructors, Local 96 (Applicant) v. Otis Canada Inc. (Respondent) (Granted)

2019-09-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Canada Inc. (Respondent) (Granted)

2020-09-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Canada Inc. (Respondent) (Granted)

2739-09-G: International Union of Elevator Constructors, Local 96 (Applicant) v. Otis Canada Inc. (Respondent) (Granted)

2943-09-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Cloke-Kirby Construction Limited (Respondent) (Withdrawn)

2367-10-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Board of Governors of Exhibition Place (Respondent) (Withdrawn)

4285-10-G: Brick and Allied Craft Union of Canada, Local 28 (Applicant) v. Calabria Cement & Tile (Respondent) (Dismissed)

0208-11-G: Labourers' International Union of North America, Local 1036 (Applicant) v. Calabria Cement & Tile (Respondent) (Dismissed)

1042-11-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Eptcon Ltd. (Respondent) v. International Brotherhood of Electrical Workers, Local 353, International Brotherhood of Electrical Workers, Construction Council of Ontario, The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario ("ETBA") (Intervener) (Withdrawn)

1172-11-G: Brick and Allied Craft Union of Canada, Local 28 (Applicant) v. Calabria Cement & Tile (Respondent) (Dismissed)

1645-11-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Eptcon Ltd. (Respondent) v. International Brotherhood of Electrical Workers, Local 353, International Brotherhood of Electrical Workers, Construction Council of Ontario, The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario ("ETBA") (Intervener) (Withdrawn)

1660-11-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Eptcon Ltd. (Respondent) v. International Brotherhood of Electrical Workers, Local 353, International Brotherhood of Electrical Workers, Construction Council of Ontario, The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario ("ETBA") (Intervener) (Withdrawn)

2575-11-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Eptcon Ltd. (Respondent) v. International Brotherhood of Electrical Workers, Local 353, International Brotherhood of Electrical Workers, Construction Council of Ontario, The Electrical Trades Bargaining Agency of the Electrical Contractors Association of Ontario (Intervener) (Withdrawn)

2846-11-G: International Brotherhood of Electrical Workers Local 804 (Applicant) v. Mr. Greg Kilner, c.o.b. as Bas Electrical Installations (Respondent) (Withdrawn)

3052-11-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Dineen Construction Limited (Respondent) (Withdrawn)

3077-11-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Eptcon Limited (Respondent) (Withdrawn)

3587-11-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Eptcon Ltd. (Respondent) (Withdrawn)

3822-11-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Eptcon Limited (Respondent) v. International Brotherhood of Electrical Workers Construction Council of Ontario (Intervener) (Withdrawn)

3960-11-G: Brick and Allied Craft Union of Canada, Local 29 International Union of Bricklayers and Allied Craftworkers, Local 20, Brick and Allied Craft Union of Canada and Ontario Provincial Conference (Applicant) v. Novenco Consultants Limited (Respondent) (Withdrawn)

0118-12-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 765 (Applicant) v. Process Mechanical Installations (Respondent) (Withdrawn)

1218-12-G: Sheet Metal Workers'International Association Local Union 47 (Applicant) v. Flynn Canada Ltd. (Respondent) (Withdrawn)

1393-12-G: Sheet Metal Workers' International Association, Local 473 (Applicant) v Nortex Roofing Ltd. (Respondent) (Withdrawn)

1428-12-G: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. Phoenix Gunite Services Ltd. (Respondent) (Withdrawn)

1479-12-G: De Marinis (DMA) Incorporated (Applicant) v. Ontario Provincial Conference of the IUBAC, Local 7 (Respondent) (Withdrawn)

1590-12-G: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Zenith Panel & Cladding (Respondent) (Withdrawn)

1863-12-G: Carpenters District Council of Ontario, Local 2041 (Applicant) v. Prefab Engineered Wall Systems Inc. (Respondent) (Granted)

1923-12-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Uptown Masonry Inc. (Respondent) (Withdrawn)

2009-12-G: International Union of Elevator Constructors, Local 96 (Applicant) v. Thyssen Elevators Limited / Ascenseurs Thyssen Limitee (Respondent) (Withdrawn)

2066-12-G: United Association of Journeymen and Apprentices of The Plumbing and Pipefitting Industry of The United States and Canada, Local Union 46 (Applicant) v. Geo. A. Kelson Company Ltd. (Respondent) (Withdrawn)

2193-12-G: International Association of Heat and Frost Insulators and Allied Workers, Local 95 (Applicant) v. B.L. Thermal Insulation Ontario Inc. (Respondent) (Endorsed Settlement)

2483-12-G: International Union of Operating Engineers, Local 793 (Applicant) v. Lakeside Contracting Co. Ltd. (Respondent) (Withdrawn)

2515-12-G: International Union of Operating Engineers, Local 793 (Applicant) v. Aecon Construction and Materials Ltd (Respondent) (Withdrawn)

2565-12-G: Labourers' International Union of North America, Local 506 (Applicant) v. Herve Pomerleau Ontario Inc. (Respondent) (Withdrawn)

2600-12-G: Brick and Allied Craft Union of Canada, Local 5 (Applicant) v. Hayman Construction Inc. (Respondent) (Terminated)

2631-12-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 853 Sprinkler Fitters of Ontario (Applicant) v. Fire Protection Solutions Inc. (Respondent) (Endorsed Settlement)

2694-12-G: Construction and Allied Workers Union Local 607 (Applicant) v. Kiewit-Alarie, A Partnership (Respondent) (Terminated)

2711-12-G: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Landform Canada Construction Ltd. (Respondent) (Withdrawn)

2712-12-G: International Union of Operating Engineers, Local 793 (Applicant) v. Associated Paving Company Ltd. (Respondent) (Withdrawn)

2713-12-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. 1674560 Ontario Ltd o/a MS High Voltage (Respondent) (Withdrawn)

2715-12-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Richview Electric Inc. (Respondent) (Granted)

2716-12-G: Labourers' International Union of North America, Local 506 (Applicant) v. City Wide Demolition Ltd. c.o.b. as Citywide Demolition & Excavation Ltd. and/or, Jason Caron in his personal capacity and c.o.b. as Down Right Demolition & Excavation Ltd. and/or, Dallas Dmytrow in his personal capacity and c.o.b. as Down Right Demolition & Excavation Ltd. (Respondent) (Granted)

2771-12-G: International Union of Operating Engineers, Local 793 (Applicant) v. Varcon Construction Corporation (Respondent) (Withdrawn)

2774-12-G: International Union of Operating Engineers, Local 793 (Applicant) v. Sterling Crane - A Division of Procrane (Respondent) (Withdrawn)

2777-12-G: The Carpenters' District Council of Ontario, Local 1669 (Applicant) v. Pomerleau Inc. (Respondent) (Withdrawn)

2781-12-G: Labourers' International Union of North America, Local 1059 (Applicant) v. London Paving & Concrete Ltd. (Respondent) (Terminated)

2786-12-G: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers on its behalf and on behalf of Local Lodge 128 (Applicant) v. KBR Canada Ltd. (Respondent) (Withdrawn)

2788-12-G: International Association of Heat and Frost Insulators and Allied Workers, Local 95 (Applicant) v. Gregory Simpson c.o.b. as Gas Insulation (Respondent) (Endorsed Settlement)

2794-12-G: Sheet Metal Workers' International Association, Local Union No. 285 (Applicant) v. Brenmar Heating & Air Conditioning Ltd. (Respondent) (Withdrawn)

2810-12-G: International Union of Bricklayers and Allied Craftworkers, Local 7 (Applicant) v. Lilika Masonry (Respondent) (Granted)

2816-12-G: International Association of Heat and Frost Insulators and Allied Workers, Local 95 (Applicant) v. Dew Point Insulation Systems (Respondent) (Withdrawn)

2821-12-G: Bricklayers, Masons Independent Union of Canada, Local 1, Universal Workers' Union, Labourers' International Union of North America, Local 183 and Masonry Council of Unions Toronto and Vicinity (Applicant) v. Next Progress Masonry Ltd. and, Oak Valley Masonry Ltd. (Respondent) (Granted)

2828-12-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Gala Store Fixtures Installations Inc. (Respondent) (Withdrawn)

2830-12-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Richview Electric Inc. (Respondent) (Granted)

2835-12-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Al Buonaiuto c.o.b. as King Decor (Respondent) (Granted)

2843-12-G: Labourers' International Union of North America, Local 527 (Applicant) v. Landform Canada Construction Ltd. (Respondent) (Withdrawn)

2862-12-G: United Brotherhood of Carpenters and Joiners of America, Local 1669 (Applicant) v. Kiewit-Alarie - A Partnership (Respondent) (Withdrawn)

2869-12-G: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. Boardwalk Painting & Decorating Inc. (Respondent) (Granted)

2873-12-G: International Brotherhood of Electrical Workers, Local Union 1687 (Applicant) v. Laird Constructors (Respondent) (Withdrawn)

2904-12-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 765 (Applicant) v. Soqqvvadro Airectors Inc. (Respondent) (Granted)

2906-12-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Dufferin Construction Company, Division of Holcim (Canada) Inc. (Respondent) (Withdrawn)

2918-12-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463 (Applicant) v. BML Multi Trades Group Ltd. (Respondent) (Endorsed Settlement)

2927-12-G: Sheet Metal Workers' International Association Local 30 (Applicant) v. Royal Windsor Mechanical Inc. (Respondent) (Granted)

2928-12-G: Carpenters District Council of Ontario Local Union 785 (Applicant) v. PCR Contractors and, Collavino Brothers (Respondent) (Endorsed Settlement)

2931-12-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Aluminum Pro Inc. (Respondent) (Granted)

2934-12-G: International Union of Operating Engineers, Local 793 (Applicant) v. C. H. Excavating (London) Ltd. (Respondent) (Granted)

2976-12-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Excel Drywall Ltd. (Respondent) (Granted)

2996-12-G: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. Edwards-Murphy Painting & Decorating Limited (Respondent) (Granted)

3012-12-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. United Plumbing Inc. (Respondent) (Granted)

3014-12-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. MJM Mechanical Contracting (Respondent) (Granted)

3065-12-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. Tybrecam Installations Inc. (Respondent) (Withdrawn)

APPEALS - EMPLOYMENT STANDARDS ACT

2513-09-ES: Mukesh Chopra (Applicant) v. Noble Group of Finance and, Director of Employment Standards (Respondent) (Dismissed)

1647-10-ES: Luc Robitaille, a Director of Onco Petroleum (Applicant) v. Lorann Lalonde, Peter Dorrins, Ramanjit Boparoy and, Director of Employment Standards (Respondent) (Endorsed Settlement)

3087-10-ES: Craig Bagshaw, a Director of Telantek Global Telecom Corp. (Applicant) v Mike (Michael) Stachejc1uk and, Director of Employment Standards (Respondent) (Dismissed)

3131-10-ES: Jeff Halloran a Director of Phantom Fiber Corporation (Applicant) v. John Paul Lee and, Director of Employment Standards (Respondent) (Dismissed)

3132-10-ES: Jeff Halloran a Director of Phantom Fiber Corporation (Applicant) v. Jessica R. Dexter and, Director of Employment Standards (Respondent) (Endorsed Settlement)

3133-10-ES: Jeff Halloran a Director of Phantom Fiber Corporation (Applicant) v. Frank Uccello and, Director of Employment Standards (Respondent) (Endorsed Settlement)

3134-10-ES: Jeff Halloran a Director of Phantom Fiber Corporation (Applicant) v. Herbert Sears and, Director of Employment Standards (Respondent) (Dismissed)

3135-10-ES: Jeff Halloran a Director of Phantom Fiber Corporation (Applicant) v. Philip M. Foss and, Director of Employment Standards (Respondent) (Dismissed)

3136-10-ES: Jeff Halloran a Director of Phantom Fiber Corporation (Applicant) v. Rimma Beilis and, Director of Employment Standards (Respondent) (Endorsed Settlement)

0503-11-ES: Nathan Robinson a Director of Cellpoint Connect (Canada) Inc. (Applicant) v. Wei Yang, Director of Employment Standards (Respondent) (Endorsed Settlement)

1021-11-ES: Jonathan Perry (Applicant) v. 1775922 Ontario Ltd o/a Windsor Emergency Plumbing and, Director of Employment Standards (Respondent) (Dismissed)

1120-11-ES: Complete Communication Systems Inc. (Applicant) v. Julian Sneigocki and, Director of Employment Standards (Respondent) (Endorsed Settlement)

1459-11-ES: Canadian Injury Management Services Inc. (Applicant) v. Brigitte Goudreau and, Director of Employment Standards (Respondent) (Withdrawn)

1617-11-ES: Brigitte Lamblot, a Director of Paragon Creative Concepts Inc. o/a Vie Maga1ine (Applicant) v. Dyan Perry and, Director of Employment Standards (Respondent) (Endorsed Settlement)

1777-11-ES: Serbian Club of Sudbury (Applicant) v. Nicole Leblanc and, Director of Employment Standards (Respondent) (Withdrawn)

2041-11-ES: Petter 1oumtos (Applicant) v. Global Credit & Collection Inc. and, Director of Employment Standards (Respondent) (Terminated)

2228-11-ES: Dragon Pearl Buffet Inc. o/a Dragon Pearl Buffet (Applicant) v. Yu Ling Shang and, Director of Employment Standards (Respondent) (Granted)

2542-11-ES: Ramalingham Sivalingham, a Director of 2217272 Ontario Ltd. (Applicant) v. Amil Karimov and, Director of Employment Standards (Respondent) (Endorsed Settlement)

3030-11-ES: Ming Poon, director of Xandros Corporation (Applicant) v. Scott Bambrough, Marc Bellefleur, Adrienne Renee Bernays, Dhruv Biswas, Wayne Brown, Charles Chamberlain, Jules d'Entremont, Rob Doucette, Steven Dwyer, Robert Echlin, Dmitri Fedorov, Shawn Green, Michael Guthrie, Michael Henseler, Yuen Sang (Ruby) Ho, Adrian Huestis, Hussam Ibrahim, Idris Ismail, Bruce Itterman, Ritu Jain, Brian Jones, Joe Kenkel, Matt Larose, Lin Li, Yunfeng Li, Wenli Liu, Yu (Jane) Liu, Peter Ma, Jeff Madott, Kenneth Mahoney, Irina Marks, Mikhail Mur1in, David Myers, Kapil Nayar, True Nguyen, Davlet Panech, Stephen Pilon, Yuriy Poslavskyy, 1huyi Qin, Gilles Rioux, Brian Rolfe, Michael Rollins, Dana Schofield, Li She, Gang (Ed) Shi, 1hiyuan (Jerry) Sui, Troy Tuttle, Rangasrinivasan Venkataraman, Reuben Wall, Byron Walton, Kris Warkentin, Jeff Williams, Yu-Ming Xu, Xiang Sheng 1hang, Chris Barrett, 1ygo Blaxell, Tadas Bubelevicius, Sean Cumming, Stephen Depooter, Paul Dombowsky, Kelly Fraser, Michael Gale, Jared Hendry, Jaime (James) Hernande1, Peter Hodgkinson, Sarah Jacobs, Timothy Kallinis, Nathan Kirk, Dan Krit1, Jeong-Yun Lee, Wayne Leroux, Tiffany Lewis, Heather MacIntosh, Kevin Macpherson, Alexander Makaryk, Alan Mamanteo, James McOrmond, Brett Melbourne, Gayathri Nagalingam, Dave Neil, Adam Nevraumont, Oleg Noskov, Christopher Olsen, Martin Paquette, Quamrun Peea, Yan Feng (Connie) Qin, Marufur Rahman, Alexei Rousskikh, Abdel O. Said, Barry Smith, Woody Suwalski, Patrick Suwalski, Ivan Tomek, Stéphane Tremblay, Colleen Trudel, Boris Vilkoff, Stephen Webb, Ken Wong, Robert Young and, Director of Employment Standards (Respondent) (Dismissed)

3032-11-ES: Gulnar Dewji (Applicant) v. Dr. G. Bal Dentistry Professional Corporation, Director of Employment Standards (Respondent) (Endorsed Settlement)

3340-11-ES: Shelly Boudreau (Applicant) v. Kelcom - Windsor Telco Inc. and, Director of Employment Standards (Respondent) (Terminated)

3375-11-ES: Adam Den Besten (Applicant) v. Bruce Normand Morrison and Kerry John Williams o/a Buildall Installations, Director of Employment Standards (Respondent) (Withdrawn)

3472-11-ES: Pedro A. Q. Morais (Applicant) v. National Decor Painting & Decorating Ltd. and, Director of Employment Standards (Respondent) (Dismissed)

3624-11-ES: Arlene Kelly (Applicant) v. Humber River Regional Hospital and, Director of Employment Standards (Respondent) (Dismissed)

3714-11-ES: Vanessa Ng director of Ryan Electric Inc. (Applicant) v. John Henry He and, Director of Employment Standards (Respondent) (Terminated)

3752-11-ES: Marialyn Lallen (Applicant) v. Juanita Curle, Director of Employment Standards (Respondent) (Withdrawn)
0045-12-ES: Ryan Arnold director of Ryan Electric Inc. (Applicant) v. John Henry He and, Director of Employment Standards (Respondent) (Terminated)

0151-12-ES: 1394808 Ontario Limited o/a McConnell Automotive (Applicant) v. Paul MacIsaac, Director of Employment Standards (Respondent) (Withdrawn)

0197-12-ES: Tastebud1 Place Norfolk Inc. (Applicant) v. Kathy Beckham, Dianne Chatelain, Melissa Yoe, Siobhan Beckham, Ashley Littel, Director of Employment Standards (Respondent)
(Withdrawn)

0225-12-ES: Chuck's Burger Bar Inc. (Applicant) v. Christine Williams, and Director of Employment Standards (Respondent) (Granted)

0363-12-ES: Roy-Al Rentals Limited (Applicant) v. Todd R McGillivray and, Director of Employment Standards (Respondent) (Endorsed Settlement)

0366-12-ES: Canadian Storage Centres Inc. (Applicant) v. Keith Morgan, and Director of Employment Standards (Respondent) (Endorsed Settlement)

0384-12-ES: Adrienne Irvine (Applicant) v. Service Corporation International (Canada) ULC, Director of Employment Standards (Respondent) (Endorsed Settlement)

0708-12-ES: 450477 Ontario Limited operating as Chartrand Equipment (Applicant) v. Real Doucet and, Director of Employment Standards (Respondent) (Endorsed Settlement)

0722-12-ES: Paul Gilhuis (Applicant) v. High Point Commercial Management Services Inc. and, Director of Employment Standards (Respondent) (Endorsed Settlement)

0724-12-ES: High Point Commercial Management Services Inc. (Applicant) v. Paul Gilhuis and, Director of Employment Standards (Respondent) (Endorsed Settlement)

0755-12-ES: Andrew Louis Holroyd (Applicant) v. Cuddy Farms Limited 2008, and Director of Employment Standards (Respondent) (Withdrawn)

0973-12-ES: 1164354 Ontario Inc. (Applicant) v. Matthew Reslitnyk, and Director of Employment Standards (Respondent) (Granted)

0977-12-ES: Willfried H. Gerlach (Applicant) v. James McDermott Services Inc. and, Director of Employment Standards (Respondent) (Endorsed Settlement)

1123-12-ES: Commissionaires (Great Lakes) (Applicant) v. Corey Ayotte and, Director of Employment Standards (Respondent) (Endorsed Settlement)

1145-12-ES: Manufacturers Direct Foods Inc. operating as Pawsitively Raw Foods (Applicant) v. Lisa Starr and, Director of Employment Standards (Respondent) (Endorsed Settlement)

1146-12-ES: Manufacturers Direct Foods Inc. operating as Pawsitively Raw Foods (Applicant) v. Janice Starr and, Director of Employment Standards (Respondent) (Endorsed Settlement)

1147-12-ES: Manufacturers Direct Foods Inc. operating as Pawsitively Raw Foods (Applicant) v. Norman Starr and, Director of Employment Standards (Respondent) (Endorsed Settlement)

1153-12-ES: South Asian Generation Next Inc. (Applicant) v. Anna C. Katryan and, Director of Employment Standards (Respondent) (Withdrawn)

1269-12-ES: Compass Group Canada (Applicant) v. Carolyn Slabo, and Director of Employment Standards (Respondent) (Endorsed Settlement)

1348-12-ES: Eco-Shift Power Corp. (Applicant) v. Jan Christopher Vargas and, Director of Employment Standards (Respondent) (Withdrawn)

1351-12-ES: Northview Windows and Doors Inc. (Applicant) v. Peter Wolf, Director of Employment Standards (Respondent) (Dismissed)

1434-12-ES: Wal-Wil Futures Inc. o/a Shoeless Joe's Westmount (Applicant) v. Peter Marshall and, Director of Employment Standards (Respondent) (Dismissed)

1493-12-ES: George Court (Applicant) v. Exacaire Mechanical Systems Ltd. and, Director of Employment Standards (Respordent) (Granted)

1495-12-ES: Hamid Rela Kaywandarian & Mahanal Reyani o/a Renokay (Applicant) v. Iabihullah Hashemi and, Director of Employment Standards (Respondent) (Endorsed Settlement)

1639-12-ES: Kashruth Council of Canada (Applicant) v. and Director of Employment Standards (Respondent) (Terminated)

1661-12-ES: DeBastos & Son Ltd. (Applicant) v. Michel Cloutier, and Director of Employment Standards (Respondent) (Endorsed Settlement)

1669-12-ES: C & C Link Consulting Ltd. and (Applicant) v. Director of Employment Standards (Respondent) (Terminated)

1673-12-ES: Schneider's Computing & Websites Ltd. c/o Brent Schneider (Applicant) v. Nick Lingard, Director of Employment Standards (Respondent) (Endorsed Settlement)

1689-12-ES: Norma Bachour (Applicant) v. International Clothiers Inc., and Director of Employment Standards (Respondent) (Withdrawn)

1753-12-ES: Joy Williams (Applicant) v. York University, and Director of Employment Standards (Respondent) (Endorsed Settlement)

1759-12-ES: Jian Ihen Lin (Applicant) v. 2259671 Ontario Inc. o/a Victory Laundry & Linen Rental, and Director of Employment Standards (Respondent) (Dismissed)

1768-12-ES: 1025091 Ontario Limited o/a Godfather Pilla (Applicant) v. Kathryn Price, and Director of Employment Standards (Respondent) (Endorsed Settlement)

1813-12-ES: AWS Irrigation Management Inc. (Applicant) v. Daniel Roberts, and Director of Employment Standards (Respondent) (Endorsed Settlement)

2007-12-ES: DeBastos & Son Limited (Applicant) v. Remi Lanteigne and, Director of Employment Standards (Respondent) (Endorsed Settlement)

2032-12-ES: Dane Ramoutar (Applicant) v. Toronto International Film Festival, and Director of Employment Standards (Respondent) (Endorsed Settlement)

2139-12-ES: Deem Management Limited (Applicant) v. Steve Watkins and, Director of Employment Standards (Respondent) (Endorsed Settlement)

2200-12-ES: Frank's Tire Service of Hamilton Ltd. (Applicant) v. Michael Montreuil and, Director of Employment Standards (Respondent) (Dismissed)

2207-12-ES: Dealfind.Com Inc./MenuPalace.Com Corporation (Applicant) v. Adam Slabo and, Director of Employment Standards (Respondent) (Endorsed Settlement)

2212-12-ES: Automatic Car and Truck Sales Inc. (Applicant) v. Glen Sim and, Director of Employment Standards (Respondent) (Endorsed Settlement)

2216-12-ES: 1382472 Ontario Limited operating as Ray's Tire Depot (1999) (Applicant) v. Michael Collins and, Director of Employment Standards (Respondent) (Endorsed Settlement)

2234-12-ES: Alexander Phan (Applicant) v. Pla1a Consulting Inc. o/a QA Consultants, and Director of Employment Standards (Respondent) (Endorsed Settlement)

2280-12-ES: Wikwemikong Nursing Home (Applicant) v. Barry Trudeau and, Director of Employment Standards (Respondent) (Endorsed Settlement)

2293-12-ES: Antonio Deangelis (Applicant) v. 2301789 Ontario Inc. o/a Michaels Inn, and Director of Employment Standards (Respondent) (Withdrawn)

2333-12-ES: 177917 Canada Inc. operating as Kanata Ma1da (Applicant) v. Kyle Laight and, Director of Employment Standards (Respondent) (Endorsed Settlement)

2347-12-ES: Chippy's Fish & Chips Inc. (Applicant) v. Jane Doma, Director of Employment Standards (Respondent) (Dismissed)

2387-12-ES: Jagdish Loganathan (Applicant) v. Wilson Management Company Inc., Director of Employment Standards (Respondent) (Endorsed Settlement)

2391-12-ES: Sutton Group Central Realty Inc. (Applicant) v. Cindy Borrelli, Director of Employment Standards (Respondent) (Endorsed Settlement)

2414-12-ES: Matthew Thompson (Applicant) v. 1818237 Ontario Inc. o/a Delta Pinestone Resort, Director of Employment Standards (Respondent) (Dismissed)

2552-12-ES: Pla1a Consulting Inc. (Applicant) v. Peter Pham and, Director of Employment Standards (Respondent) (Terminated)

2623-12-ES: 1289401 Ontario Limited o/a Rainbow Services (Applicant) v. Jason R. Kloss, and Director of Employment Standards (Respondent) (Dismissed)

2638-12-ES: ICC Healthnet Canada Inc. (Applicant) v. Rebecca Silverman and, Director of Employment Standards (Respondent) (Terminated)

2639-12-ES: Serpa Automobile (2012) Corporation (Applicant) v. Alan Pressman, Director of Employment Standards (Respondent) (Endorsed Settlement)

2651-12-ES: Paradise Pools of Canada Limited (Applicant) v. Joseph Puglisi, Director of Employment Standards (Respondent) (Terminated)

2687-12-ES: Gualtieri Farms Ltd. (Applicant) v. Donavan Fowler, and Director of Employment Standards (Respondent) (Terminated)

2847-12-ES: The Bullion Mart Inc. (Applicant) v. Md Ma1umder and, Director of Employment Standards (Respondent) (Terminated)

2892-12-ES: Lyudmyla Nikulina (Applicant) v. Loblaw Companies Limited Les Compagnies Loblaw Limitee, and Director of Employment Standards (Respondent) (Dismissed)

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

0631-11-HS: Golder Associates Ltd. (Applicant) v. Karim Kassam, Inspector (Respondent) (Terminated)

2464-11-HS: Chrysler Canada Inc. (Applicant) v. Canadian Auto Workers Local 444, Ken Brown, Ergomonist - Inspector MOL (Respondent) (Terminated)

1953-12-HS: Tembec Inc., Cochrane Sawmill (Applicant) v. United Steel Workers, Local 1-2012, Michel Charron, representing the employees of Tembec's Cochrane Sawmill, A Director under the Occupational Health and Safety Act (Respondent) (Withdrawn)

CECBA - EXEMP: RELIGIOUS CONVICTION/BELIEF

2831-09-M: Gailene Durrant Lennon (Applicant) v. Service Employees International Union Local 1 and, Valleyview Residence (Respondent) (Withdrawn)

2869-09-M: Patrick Cejudo (Applicant) v. Service Employees International Union Local 1 and, Valleyview Residence (Respondent) (Withdrawn)

2870-09-M: Florence Brown (Applicant) v. Service Employees International Union Local 1 and, Valleyview Residence (Respondent) (Withdrawn)

2871-09-M: Adon Adap (Applicant) v. Service Employees International Union Local 1 and, Valleyview Residence (Respondent) (Withdrawn)

2872-09-M: Luisa Civera (Applicant) v. Service Employees International Union Local 1 and, Valleyview Residence (Respondent) (Withdrawn)

2873-09-M: Andrew Jardine (Applicant) v Service Employees International Union Local 1 and, Valleyview Residence (Respondent) (Withdrawn)

2874-09-M: Sylvia Jackson (Applicant) v. Service Employees International Union Local 1 and, Valleyview Residence (Respondent) (Withdrawn)

2875-09-M: Heidi Malon (Applicant) v. Service Employees International Union Local 1 and, Valleyview Residence (Respondent) (Withdrawn)

PAY EQUITY ACT

1634-12-PE: Farm Fresh Poultry Co-Op Inc. (Applicant) v. Karen Cassel (Respondent) (Withdrawn)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0259-08-U: Kimberley Ann Gilmour (Applicant) v. Elementary Teachers' Federation of Ontario and, Elementary Teachers' Federation of Ontario and (Respondent) v. Hastings and Prince Edward District School Board (Intervener) (Dismissed)

0357-09-R: UNITE HERE (Applicant) v. Novotel Canada Inc., Accor Canada Inc. and Novotel Mississauga o/a Hotel Novotel Toronto Mississauga Centre (Respondent) (Dismissed)

0273-10-ES: Weihua (Marie) Shi (Applicant) v. Holcim (Canada) Inc. and, Director of Employment Standards (Respondent) (Dismissed)

1578-12-U: Mr. Steve Paterek (Applicant) v. Seafarers' International Union of Canada (Respondent) (Dismissed)

2036-12-R: The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Cahill Construction Inc. (Respondent) (Dismissed)

2578-12-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Wasif Yousif c.o.b. as Khider Electromechanical (Respondent) (Dismissed)

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ISSN 0383-4778